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No. _____

In The

Supreme Court of the United States

MICHAEL FISHER,

Petitioner,

v.

STATE OF TEXAS

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Texas statute for the civil commitment of sexually violent predators, which relies heavily on criminal penalties and procedures to punish the mentally ill, is punitive and therefore requires appropriate due process protection.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Fisher respectfully petitions for a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

OPINIONS BELOW

The Texas Supreme Court's opinion is available at 164 S.W.3d 637, publication pending. The appendix reproduces the Court's opinion. Pet. App. 1. The Texas Thirteenth Court of Appeals' opinion is published at 123 S.W.3d 828. Pet. App. 38. The judgment of the 248th District Court of Montgomery County is unpublished. The Final Judgment and Order of Commitment is reproduced in the appendix. Pet. App. 7a.

JURISDICTION

The Texas Supreme Court issued its opinion on May 20, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend V.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Texas statute governing the civil commitment of sexually violent predators is TEX. HEALTH & SAFETY CODE §§ 841.001 *et seq.* (Vernon 2004). The statute is reproduced in its entirety in the appendix. Pet. App. 102-133.

STATEMENT

This case involves the constitutionality of the Texas Civil Commitment of Sexually Violent Predators statute. Petitioner was committed under this statute but alleges it denies him due process of law.

1. The Texas Civil Commitment of Sexually Violent Predators Statute (hereinafter Texas SVP Act) was enacted in 1999. The legislature found, "a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence." TEX. HEALTH & SAFETY CODE § 841.001. The stated purposes of the statute are "the long-term supervision and treatment of sexually violent predators." *Id.*

The Texas SVP Act orders committed individuals to be treated in an outpatient setting rather than in a secure

mental facility. *Id.* § 841.081. Commitment requirements are imposed to ensure those in the program comply with their treatment and do not re-offend. *Id.* § 841.082. To enforce the commitment requirements, an individual may be prosecuted for a third degree felony for any violation of commitment, even for an act that is not, in itself, criminal. *Id.* § 841.085. Committed individuals must remain in outpatient treatment and "may not be housed for any period of time in a mental health facility, state school, or community center." *Id.* § 841.083.

Those eligible for commitment include those convicted of more than one sexually violent offense and those found not guilty by reason of insanity for a sexually violent offense. *Id.* § 841.003. Commitment cases are prosecuted by the Prison Prosecution Unit and defended by State Counsel for Offenders. Both entities generally prosecute and defend cases that arise within the Texas Department of Criminal Justice (TDCJ). *Id.* §§ 841.004, 841.005. A Multidisciplinary Team, comprised of two persons from the Texas Department of Mental Health and Mental Retardation, two persons from TDCJ (one of whom must be from the victim services office), one person from the Texas Department of Public Safety, and two persons from the Council on Sex Offender Treatment, may recommend an eligible individual for commitment. *Id.* § 841.022. The offender is then given a behavioral assessment that can lead to a referral to the prosecuting attorney. *Id.* § 841.023. Petitions alleging predator status are filed in Montgomery County, Texas, in a district court. *Id.* § 841.041. A trial is held to determine whether an individual is a sexually violent predator beyond a reasonable doubt. *Id.* § 841.062.

Once committed, an individual is given an examination and judicial review on a biennial basis. *Id.* §§ 841.101,

841.102. A case manager may authorize a petition to the court for release at any time. *Id.* § 841.121. If an individual files a petition for release without the approval of the case manager, the judge shall review the petition. However, if the individual brings successive unauthorized petitions, the judge may deny them without a hearing. *Id.* § 841.123.

2. Petitioner suffers from paranoid schizophrenia, antisocial personality disorder, and mild mental retardation. He has been hospitalized for psychiatric problems on several occasions.

Petitioner pleaded guilty to two counts of second-degree sexual assault in 1987 and was sentenced to two years' incarceration. Petitioner pleaded guilty to one count of first-degree aggravated sexual assault while on parole and received a ten-year sentence. His parole for that conviction was revoked twice, in 1996 and 1999.

Commitment proceedings were brought against him in October 2000. Before trial, Petitioner moved for a continuance alleging he was unable to consult with counsel due to his mental state. Petitioner testified that he did not want counsel's assistance and refused to allow counsel to talk to his mother. The trial court denied the motion. Petitioner also submitted a motion for a competency hearing. The court permitted an offer of proof allowing Petitioner to present the testimony of a psychologist and a psychiatrist. They testified that Petitioner was incompetent, unable to understand the proceedings, and unable to assist counsel. Pet. App. 40-41. The state, through the Prison Prosecution Unit, offered no controverting evidence. The court denied the motion.

At trial, the state called Petitioner to the stand and questioned him about his prior convictions and a prior charge for which he was not convicted.

The jury found Petitioner to be a sexually violent predator. The trial court entered judgment and issued an Order of Commitment, including a requirement that Petitioner abide by all conditions of treatment as provided in the Civil Commitment Requirements. Pet. App. 80.

3. Petitioner appealed, claiming the statute was punitive, both facially and as applied. In addition, Petitioner argued that his due process right to stand trial while competent, his due process right to consult with counsel, and his Fifth Amendment right against self-incrimination were violated. The Thirteenth Court of Appeals agreed and reversed and remanded Petitioner's commitment. They found that Petitioner was mentally incompetent and could not be held to the "contract" of commitment. The court also found Petitioner's right to counsel, as provided by the statute, must include his right to a meaningful opportunity to be heard. The court held several aspects of the commitment scheme were punitive in nature, and that the statute itself was punitive. *See* Pet. App. 38-78.

4. Respondent appealed to the Texas Supreme Court. The Prison Prosecution Unit appeared as an amicus curiae. The Court based its analysis on the United States Constitution. The Court found that the legislature created the statute with an "unquestionably" civil intent. Pet. App. 18. In its analysis of the statute's purposes and effects, the Court found that the statute "imposes no physical restraint," but did "impose[] affirmative disabilities." Pet. App. 19. However, the Court found that "this factor alone does not compel a conclusion that the statute is punitive."

Pet. App. 20. The Court then found the historical view of commitment weighed against a punitive finding. *Id.*

The Court found the statute was not retributive, had no scienter requirement, and that its function as a deterrent was an "incidental" effect. Pet. App. 21-23. The Court did not consider whether there was an alternative purpose to which the act may be rationally connected, but instead determined whether there was a rational connection to a nonpunitive purpose. Pet. App. 25. The Court failed to consider whether the statute served an alternative purpose besides treatment or supervision. The Court also found that the Act was not excessive even though it contained "punitive aspects." Pet. App. 30.

Because the Court found the Texas SVP Act to be civil, it found that Petitioner was not entitled to a competency determination. Pet. App. 31. In addition, the Court found no merit to Petitioner's claim that his compelled testimony violated the Fifth Amendment. Pet. App. 33.

This petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted To Review The Texas Supreme Court's Holding That The Texas Civil Commitment of Sexually Violent Predators Statute Is Civil And Comports With Due Process

A. The Texas Supreme Court's analysis in this case conflicts with this Court's rulings in *Kansas v. Hendricks* and *Kansas v. Crane*.

The Texas Civil Commitment of Sexually Violent Predators Statute (hereinafter Texas SVP Act) is much

more punitive than what is constitutionally permissible for a civil law. Though it is labeled a "civil" program aimed towards treatment, the Texas SVP Act is actually a quick, cheap way for Texas to send sex offenders to prison, a "mechanism for retribution or general deterrence." *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 372-73 (1997) (Kennedy, J., concurring)). To uphold the Texas SVP Act, the Texas Supreme Court overextended this Court's rulings in *Hendricks* and *Crane*, ignoring the guidelines for constitutional analysis set forth in those cases. The Texas SVP Act crafts post-sentence punishment for sex offenders that contradicts the stated legislative purpose, revealing the statute to be a "sham or mere pretext" to re-incarcerate sex offenders under the guise of civil commitment. *Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring).

The Texas SVP Act is markedly different from the SVP civil commitment statutes previously reviewed by this Court. Explicitly denying any form of treatment in a mental health facility, the Texas SVP Act employs only outpatient treatment, even though persons subject to the statute may be so mentally ill as to be a danger to themselves or others. It contains criminal penalties for violation of any one of over 100 rules and restrictions, making possible a sentence of life in prison for the most minor technical violations. It requires only biennial review after commitment order, and empowers the trial judge to summarily dismiss petitions for release filed by the committed person. It does not require a probable cause hearing before a commitment proceeding. It adds the requirement of a "predatory act" finding, injecting an element of intent, or scienter, into its "sexually violent predator" definition.

Finally, it requires that all commitment proceedings take place in a single county (out of 254 Texas counties), bringing all actions before the same courts, judges, and juries. These provisions do not serve the stated purposes of the statute. *See generally*, Pet. App. 102-133. Instead, when viewed in the aggregate, the Texas SVP Act creates a low-cost, low-hassle funnel to return sex offenders to prison. The actual legislative purpose of the Act is to inflict punishment.

These punitive aspects of the Texas SVP Act distinguish it from other statutes this Court has found to be civil. This Court's extensive civil commitment jurisprudence has never found these novel and extreme measures to be "civil" in nature. The Texas Supreme Court upheld the Texas SVP Act only through a careless interpretation of *Kansas v. Hendricks*.

In *Hendricks*, this Court considered the relevant provisions of the Kansas statute both individually and in the aggregate to determine whether the statute was punitive. The ruling specifically limited itself to the facts present in *Hendricks*. Upon revisiting the Kansas statue in *Crane*, the Court found that *Hendricks* did not create a "precise constitutional standard" and that the murky waters of civil commitment and mental illness "are not always best enforced through precise bright-line rules." *Crane*, 534 U.S. at 413. The Texas Supreme Court, however, misread *Hendricks* as an unlimited endorsement of civil commitment in any form, violating both *Hendricks* and *Crane*.

In approving the Texas SVP Act, the Texas Supreme Court did not seriously consider the material differences between the Texas law and the Kansas law at issue in

Hendricks. Either the Texas Supreme Court found no difference between the Texas and Kansas statutes when there were fundamental differences, or the Court recited *Hendricks*, taking no account of the facts of Petitioner's case or the rigorous analysis required by this Court. The Texas Supreme Court has therefore misinterpreted *Hendricks* and *Crane*. Accordingly, the Texas Supreme Court's erroneous conclusions place significant federal constitutional rights of a class of citizens in peril.

1. Punitive or Civil

While this Court has "consistently upheld" civil commitment statutes, it has done so recognizing that the curtailment of individual liberty interests inherent in civil commitment makes the implementation of new, more punitive commitment schemes an ongoing danger. *Hendricks*, 521 U.S. at 357, 373 (2002) (Kennedy, J., concurring). The Court uses a two-pronged inquiry to determine whether a statute is criminal or civil. The first step of the analysis is to "determine whether [the legislature], in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *United States v. Ward*, 448 U.S. 242, 248 (1980). If the legislature shows a civil intention, the Court "inquire[s] further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.* at 249.

a. Legislative Intent

The Texas Legislature called the statute "Civil Commitment of Sexually Violent Predators." Notwithstanding

its name, the SVP Act incorporates numerous criminal features, calling into question the true legislative intent.

Civil commitment statutes are often found by the Court to be civil. However, this Court has found "that a 'civil label is not always dispositive,' *Allen v. Illinois*, 478 U.S. 364, 369 (1986); it has said that in close cases the label is 'not of paramount importance,' *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 (1994); and it has looked behind a 'civil' label fairly often. E.g., *United States v. Halper*, 490 U.S. 435, 447 (1989)." *Hendricks*, 521 U.S. at 381 (Breyer, J., dissenting) (citations amended).

The location of a statute within the law may have some bearing on the intent of the legislature. *See Smith v. Doe*, 538 U.S. 84, 94-95 (2003); *Hendricks*, 521 U.S. at 359. The Texas SVP Act was placed in the Health & Safety Code, which contains both civil and criminal provisions, including controlled substance offenses, hazardous substance offenses, and penalties for disabling fire exit alarms. TEX. HEALTH & SAFETY CODE chs. 481, 482, 483, 485, 501, 793.

As others before them have done, the Texas legislature chose to call the Act "civil." But it also made a violation of commitment a felony offense. TEX. HEALTH & SAFETY CODE § 841.085. The Texas SVP Act uses the Texas Prison Prosecution Unit to prosecute commitment cases, and assigns State Counsel for Offenders to defend them. *Id.* §§ 841.004-005. Both of these entities otherwise prosecute or defend criminal cases. Additionally, the statute provides that the Prison Prosecution Unit initiate these cases while offenders are still incarcerated. *Id.* § 841.021. The Multidisciplinary Team that reviews the cases of alleged sexually violent predators includes two persons

from the Texas Department of Criminal Justice (TDCJ). *Id.* § 841.022(a)(2). TDCJ makes the initial assessment of whether an incarcerated individual is a sexually violent predator. *Id.* § 841.023. The burden of proof at all commitment proceedings is beyond a reasonable doubt. *Id.* § 841.062. Once committed, an offender may be monitored with polygraphs or plethysmographs. *Id.* § 841.083. TDCJ provides housing for committed individuals. *Id.* The selection of jurors is governed by criminal procedural rules. *Id.* § 841.146. In *Smith v. Doe*, this Court allowed a civil provision to "invoke" the criminal process, but the Texas SVP Act does not merely invoke criminal procedures, they are inextricably intertwined with the commitment process. 538 U.S. at 95. While criminal provisions or procedures may sometimes enforce civil regulations, the Texas SVP Act's excessive reliance on them makes the statute's character less clear. Because the legislature's intent is unclear, the analytical framework requires an assessment of the effects of the statute in the next step in the analysis.

b. Statutory Scheme

The intent of the legislature is not singularly determinative of whether a statute is civil in nature. "Where congress has indicated an intention to establish a civil penalty, [the Court has] inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Ward*, 448 U.S. at 248-49. In the course of this determination, the Court regularly uses the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962) as "useful guideposts." *United States v. Hudson*, 522 U.S. 93, 99 (1997). The Texas Supreme Court discussed these factors in their determination but

gave them neither the weight nor the consideration necessary. *See* Pet. App. 1-37.

The *Mendoza-Martinez* factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

372 U.S. at 168-69 (1962). As stated in *Ward*, either the purpose of the statute or its actual effects can negate stated intentions to establish a civil penalty. 448 U.S. at 248-49. Although a law may have an explicitly stated purpose, as the Texas SVP Act does, a statute's "purpose must be determined by its natural and reasonable effect." *Henderson v. Mayor of New York*, 92 U.S. 259, 268 (1876). Examination of the statute should include its text, but should be "guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94 (1993).

Review of sex offender commitment statutes requires that a court look to *Hendricks* for guidance. A proper *Hendricks* analysis applies the standards adopted by this Court to the particular statute being considered. Texas and Kansas approach commitment differently. Kansas confines to a secure facility and Texas releases into the

community. These critical differences require an analysis of the Texas statute, using *Hendricks* as a model for analysis rather than a rubber stamp for approval.

The Texas Supreme Court ignored two major elements of the Texas SVP Act that show the Act is punitive: subjection to strong criminal penalties for violation of an exacting "contract," and mistreatment of the mentally ill.

i. Criminal Penalties

The Texas SVP Act has punitive and retributive criminal penalties. It begins and ends with criminal activity. Pet. App. 59.

Past criminal conduct is required for eligibility as a Sexually Violent Predator (SVP) under the Texas Statute. TEX. HEALTH & SAFETY CODE § 841.003(b). The Texas SVP Act's definition of a "sexually violent predator" requires that a person be a "repeat sexually violent offender." Upon commitment, the code specifies ten standard requirements for committed individuals to follow, but the judge may "impose on the person requirements necessary to ensure the person's compliance with treatment and supervision and to protect the community." *Id.* § 841.082(a)(9). In this case, the trial judge appended 97 conditions to which Petitioner must adhere. Pet. App. 88-101. Violation of any condition imposed by the judge results in the prosecution of a third-degree felony and potential incarceration for two to ten years. *Id.* § 841.085; TEX. PEN. CODE § 12.34. Because offenders are required by the statute to have two prior felony charges, those with more than one conviction who violate a term of their "contract" may be enhanced to face first-degree felony sentences ranging from twenty-five

to ninety-nine years, or life. TEX. PEN. CODE § 12.42(d). As the Thirteenth Court of Appeals noted, Fisher could face a *life sentence* for use of a post office box or for rendering aid to someone stranded on the road. Pet. App. 57.

The potential for re-incarceration is extremely high and is more than mere speculation. In a 2003 study of the Texas SVP commitment program, ten of 17 offenders who had been placed in the program were re-incarcerated for violations of commitment, such as leaving home without permission.[1] None of the ten were incarcerated for offenses that were sexual or otherwise criminal in nature.[2]

Individuals who are civilly committed to inpatient treatment in a handful of other states face minor criminal consequences for already-illegal behavior, but none are subject to such severe felony penalties for the equivalent of a technical violation of probation or parole.[3] The situation most analogous to the Texas SVP Act is an extraordinarily strict probation regime with outsized punishment for "technical" violations. There is no doubt that Texas law considers probation (or community supervision) to be punishment. *See generally*, TEX. CODE CRIM. PROC. Art. 42.12. Undoubtedly, civilly committed individuals are placed in a unique class exclusive to Texas. They are

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[1] Walter J. Meyer, III, et al., *Outpatient Civil Commitment in Texas for Management and Treatment of Sexually Violent Predators: A Preliminary Report*, 47 Int'l. J. of Offender Therapy & Comp. Criminology 396, 403 (2003).

[2] *Id.* at 404.

[3] FLA. STAT. ANN. § 394.927 (second degree felony for escape); IOWA CODE § 229A.5B (simple misdemeanor for escape from a secure facility); VA. CODE ANN. § 37.1-70.18 (class 6 felony for escape).

peculiarly subject to severe sentencing for "crimes" that apply only to them.

The Texas Supreme Court did not give any weight to these issues in its consideration of Petitioner's case. After briefly reviewing the criminal aspect of the Texas statutory scheme, the Texas Supreme Court decided "the freedom from confinement outweighs the criminal sanction imposed for a failure to obey the commitment conditions." Pet. App. 29. It is true that the civilly committed sex offender in Texas is not confined to a psychiatric inpatient setting. Instead, civilly committed sex offenders are released to close supervision and, purportedly, outpatient treatment. But the true nature of the "freedom" they enjoy is detailed by the Treatment and Supervision Contract ordered by the trial court.

The Contract establishes 97 additional requirements and restrictions. Pet. App. 88-101. For example, as a result of the contract, a committed sex offender may not be "in an area where children are," may not have contact with family members without approval, may not "sit and watch people," may not go to "schools, parks, swimming pools, movie theaters, public libraries, amusement parks, arcades or malls," must abide by a dress code, may not buy or use any recording equipment, may not operate a car without approval, must be on time for all appointments, must wear an electronic tracking device, must have full-time employment, must have a written assignment for all group therapy sessions, and must comply with "any individual rules Treatment Staffs develop[.]" Pet. App. 97. The requirements imposed upon Petitioner are not those individually "determined necessary by the judge" TEX. HEALTH & SAFETY CODE § 841.082(a)(9), but instead come

directly from the Client Handbook for the State of Texas Sexually Violent Predator Program.

So, for example, even though Petitioner was not diagnosed as a pedophile and committed no offenses against family members, any contact with family members is forbidden, unless approved by his case manager. Also, although he has no history of pedophilia, he is restricted from being in any place where he may be in proximity to children and is thus subject to conditions more applicable to a pedophile. These conditions are not those envisioned as "necessary" by the Act and have severe punitive consequences.

The Texas Legislature's intent to incarcerate and punish is barely disguised by the veil of kinder, gentler outpatient treatment. The terms of the commitment order could be difficult for even the most intelligent and disciplined person to uphold. The Texas SVP Act purports to integrate committed offenders back into society but effectively disallows any presence or participation in society. There is virtually no public place where the committed offender may be present without violating the terms of his commitment order and subjecting himself to the possibility of life in prison. This is not consistent with the intention to treat or supervise, but is a "sham or mere pretext" to incarcerate sex offenders under the guise of civil commitment. *Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring).

The Texas Supreme Court's view – that this "freedom from confinement" compensates for the potential criminal penalties – contradicts the true effect of the statute. To compare the two statutes, the Kansas statute places an offender in a room and locks the door. The Texas statute

closes an unlocked door, but threatens life in prison if it is opened. Because the committed offender still may not open the door, the Texas statute does not create any more freedom from confinement, and adds consequences never considered by the Kansas statute. The two do not cancel each other out as simply as the Texas Supreme Court held.

Reviewing the Texas SVP Act, it is hard to ignore the punitive nature of the law and the impact of this on several of the *Mendoza-Martinez* factors, especially affirmative disability or restraint, retribution and deterrence, an alternative purpose, and excessiveness in relation to that purpose.

The Texas law creates significant disabilities and restraints. The provisions of the commitment order and contract prevent the offender from exercising his own agency within society, infringing on his personal liberty. Subjecting Petitioner to excessive criminal penalties for violations of these conditions is a further restraint. The slightest exercise of will or preference may remove a committed individual from society for the rest of his life.

The criminal effects of the statute are retributive and deterrent in nature and do not support any alternative purpose. Such extreme penalties for such small deviations do not enforce treatment or supervision. These harsh penalties serve only as an additional way to punish individuals who have discharged their penal sentences for their past offenses, or who never had to shoulder criminal liability for criminal conduct. In the process, the penalties place the offender back in a prison setting. Although other states have outpatient programs and allow for the revocation or modification of the offender's treatment program, the most severe penalty for any violation is continued

commitment in a secure facility for mental treatment.[4] In the alternative, those states simply allow courts to amend the treatment program to better serve the offender's needs. Even those states with criminal penalties for offenses of escape from a secure facility or failure to appear when required attach only misdemeanor or low-grade felony sanctions. None comes close to the comprehensive and punitive approach taken by Texas.

SVP Commitment in Texas involves not only commitment, but the strong likelihood of future incarceration. The severe criminal penalties of the Texas SVP Act should have been considered by the Texas Supreme Court in its analysis of the Act. This Court should determine whether it believes these onerous penalties are punitive.

ii. Mental Health

The stated purpose of the Texas SVP Act – to administer "treatment" – is disingenuous. Under the statute, offenders with severe mental disabilities are committed to a program where they cannot receive the treatment they need and, through no fault of their own, cannot comply with the terms of commitment. Further, the Act explicitly disallows treatment in any mental health facility. Those with severe mental or behavioral disabilities are destined to return to prison solely due to their disabilities.

The Texas SVP Act necessarily involves individuals with a "behavioral abnormality." TEX. HEALTH & SAFETY CODE § 841.003. The term is defined as a condition that "affect[s] a person's emotional or volitional capacity." *Id.* § 841.002.

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[4] ARIZ. REV. STAT. § 36-3713; IOWA CODE § 229A.8B.

This abnormality often affects either the mental health or capacity for impulse control of an individual. The Texas SVP Act also necessarily ensnares offenders who were found insane by a court of law. *Id.* § 841.003(b)(1)(C). The Texas statute is directed specifically at these individuals and claims that their treatment is one of its primary purposes. *Id.* § 841.001. However, the natural and reasonable effect of the statute denies available treatment to those with severe disabilities.

The Texas SVP Act specifically states, "[T]he treatment modalities for sexually violent predators are different from the traditional treatment modalities." *Id.* Traditional inpatient mental health care modalities might not work for some persons eligible for SVP commitment. The Texas SVP Act creates treatment for these offenders. Yet the statute also states, "The committed person may not be housed for any period of time in a mental health facility[.]" *Id.* § 841.083(d). Thus, those committed under the Texas SVP Act may only be treated through outpatient treatment, with no alternative. Treatment in a mental health facility would place an individual in violation of their commitment and subject them to the Act's criminal penalties. Even worse, the statute makes those adjudged insane by a court of law eligible for SVP Commitment. Because extreme mental illness or mental retardation may require treatment in a mental facility, SVP commitment necessarily denies the very treatment it purports to provide.

The problem the Texas SVP Act creates for those with extreme mental disabilities goes beyond their access to treatment. The Texas SVP Act demands rigorous compliance with the terms of the contract from all, including those like Petitioner who are afflicted with severe mental

illness or retardation. Prior to trial, Petitioner presented uncontroverted testimony from mental health experts that he had no understanding of the civil commitment proceedings, could not participate in any treatment, and would undoubtedly violate the terms of commitment. Based on this testimony, sex offender treatment is not possible for Petitioner in his current mental condition. Based on the statute's prohibition on mental facilities, no treatment within the SVP commitment regime is possible for Petitioner's mental condition. Placing mentally ill offenders in commitment serves neither the committed individual's needs nor the needs of the state.

Since the Texas SVP Act places those who may be a danger to themselves or others in a treatment program they are not able to comply with due to behavioral or mental instability, it thus becomes obvious that the Act places the mentally and behaviorally impaired in a situation where they are certain to fail no matter how hard they try. Failure, for a committed sexually violent predator, means prison, possibly for life. Release from the SVP commitment program is available only upon a showing that the offender is no longer likely to engage in predatory acts of sexual violence. Offenders with mental disabilities may never be able to make this showing without appropriate mental treatment.

Denying mental health care for committed individuals does not serve the Act's stated purposes of treatment or supervision.

This Court has found several civil commitment statutes to be constitutional, but has always considered the statutes carefully and meticulously because of the great sacrifices of liberty that civil commitment laws require of

those committed. Texas has created a plainly punitive statute subjecting the mentally and behaviorally impaired to severe criminal penalties so that they may be placed back in prison for life.

2. Due Process

In *Addington v. Texas*, this Court stated, "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." 441 U.S. 418, 425 (1979). The Texas SVP Act provides for some due process protections, such as the right to counsel, the right to a jury trial, and the right to present evidence and examine witnesses. TEX. HEALTH & SAFETY CODE §§ 841.005, 841.061(d). Subjecting an individual to SVP commitment also subjects one to the new criminal penalties attached to commitment violations. The punitive nature of the statute requires the stronger protections of the criminal process, including the right to effective assistance of counsel, the right against self-incrimination, and the right to remain silent. As it stands, the statute violates procedural and substantive due process.

Petitioner presented evidence that he did not have a rational or factual understanding of the civil commitment proceedings. He could not assist his attorney in trial preparation. The main issue of a Texas SVP commitment proceeding is the present mental state of the respondent. When respondents are incompetent, they are unable to present a legitimate defense, denying them the opportunity to be heard in a meaningful way.

At trial, the State called Petitioner as a witness and forced him to testify about his past crimes and sexual habits. The significant liberty issues at stake in Texas

mandate a respondent in a commitment proceeding be allowed to exercise his Fifth Amendment right not to incriminate himself and to remain silent.

Procedural due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "Substantive due process prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted). The Texas SVP Act violates both procedural and substantive due process by subjecting incompetent individuals to criminal penalties and violating their right to remain silent and right to effective assistance of counsel.

B. Texas's punitive commitment scheme is part of a national trend toward unconstitutional punishment of sex offenders.

Seventeen states currently have civil commitment statutes targeting sexually violent persons or predators.[5]

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[5] ARIZ. REV. STAT. §§ 36-3701 to 3717; CAL. WELF. & INST. CODE §§ 6600 to 6609.3; FLA. STAT. ANN. §§ 394.910 to 394.931; 725 ILL. COMP. STAT. 207/1 to 207/99; IOWA CODE §§ 229A.1 to 229A.16; KAN. STAT. ANN. §§ 59-29a01 to 29a21; MASS. GEN. LAWS CH. 123A §§ 1 to 16; MINN. STAT. §§ 253B.185(1) to (7); MO. ANN. STAT. §§ 632.480 to 632.513; N.J. STAT. ANN. §§ 30:4-27.24 to 27.38; N.D. CENT. CODE §§ 25-03.3-01 to 03.3-23; 42 PA. CONS. STAT. §§ 6401 to 6409; S.C. CODE ANN. §§ 44-48-10 to 170; VA. CODE. ANN. §§ 37.1-70.1 to 70.19; WASH. REV. CODE §§ 71.09.010 to 71.09.902; WIS. STAT. §§ 98.01 to 98.12.

Nine more states are currently considering such legislation.[6] If left to stand, the Texas SVP Act presents an attractive but unconscionably punitive model for other states to follow that must not be permitted.

In recent months, both state and national governments have been under tremendous political pressure from the public to "crack down" on sex offenders. All 50 States require Sex Offender Registration and the Department of Justice has announced plans for a national sex offender registry.[7] Even so, high-profile crimes involving convicted sex offenders have triggered a popular outcry from the public and the media to take further action to take offenders off the streets.[8] States have responded by seeking harsher penalties for sex offenders both through

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[6] H.R. 43, 143RD Gen. Assem., Reg. Sess. (De. 2005); S. 0494, 2005 Leg., Reg. Sess. (In. 2005); H.R. Res. 6, 2005 Leg., Reg. Sess. (Ky. 2005); L.D. 1321, 122nd Leg., 1st Reg. Sess. (Me. 2005); L.B. 567, 99th Leg., Reg. Sess. (Ne. 2005); S. 42, 47th Leg., Reg. Sess. (N.M. 2005); A. 490, 2005 Leg., Reg. Sess. (N.Y. 2005); A. 2693, 2005 Leg., Reg. Sess. (N.Y. 2005); A. 3394, 2005 Leg., Reg. Sess. (N.Y. 2005); S. 3273, 2005 Leg., Reg. Sess. (N.Y. 2005); H.R. 227, 126th Gen. Assem., Reg. Sess. (Oh. 2005); H.R. 0108, 2005 Leg., Reg. Sess. (Vt. 2005).

[7] Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L. J. 967, 1059 (2003); John Files, *National Sex Offender Database Is Announced*, N.Y. TIMES, May 21, 2005, at A10.

[8] David Scharfenberg, *Killing Makes a City Re-examine Itself*, NEW YORK TIMES, July 24, 2005, at 14WC p. 4; Betsy Z. Russell, *Senate Calls for National Sex Offender Registry; Craig Hopes Measures Can Prevent 'Tragedy Like the Groene Case'*, SPOKANE SPOKESMAN REVIEW, July 29, 2005, at B6; Marc Caputo, *Sex Offenders Face Tracking by Satellite; Death of Jessica Lunsford Has Led State Lawmakers to Pass Legislation Aimed at Using High-Tech Satellite Equipment to Track More than a Thousand Sex Offenders*, MIAMI HERALD, March 31, 2005, at A1.

longer criminal sentences and civil commitment.[9] States seeking to create or modify SVP commitment will likely use the Texas SVP Act as a model to further punish sex offenders who obtained favorable plea agreements or were successful with insanity defenses. It has the added benefit of civil discovery rules in which damaging admissions are readily obtained and easily used without the constraints of criminal process.

One problem with civil commitment is its high cost. The Texas model is also cheap, at least ten times less per offender than inpatient programs in other states.[10] Several states with inpatient civil commitment programs are struggling to continue their programs with rising costs from more and more offenders entering the system but few ever leaving.[11] When Missouri's legislature addressed the

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[9] Scharfenberg, *supra* note 5; Brad Knickerbocker, *States Step Up Efforts to Track Sex Offenders*, CHRISTIAN SCI. MONITOR, July 11, 2005, at USA 1; Bruce Alpert, *Congress Targets Sexual Predators: Officials Would Get Help Tracking Convicts*, TIMES-PICAYUNE (LA), May 3, 2005, at National 8; Terri Hallenbeck, *Douglas Unveils Civil Commitment Plan*, BURLINGTON FREE PRESS (VT), August 2, 2005, at 1B; Editorial, *Toughen Sex Offender Laws*, ARGUS LEADER (S.D.), July 27, 2005, at 7B; Patrick Orr, *Sex Offender Passed Pre-Parole Review; Fugitive Told Board He'd Keep Getting Treatment*, IDAHO STATESMAN, July 26, 2005, at Local 1; Kim Chandler, *Tougher Penalties OK'd for Sex Offenders*, BIRMINGHAM NEWS (AL), July 27, 2005, at News 1A; *Sex Offenders Kept From Storm Shelters*, N.Y. TIMES, Aug. 8, 2005, at A14.

[10] Washington State Institute for Public Policy, *Involuntary Commitment of Sexual Violent Predators: Comparing State Laws*, *at* http://www.wsipp.wa.gov/rptfiles/05-03-1101.pdf (last visited Aug. 17, 2005). (Texas projected cost: $0.5 million. 12 other states have projected costs of at least $5 million per year. California's projected cost is highest, at $45.5 million. Texas spends about $20 per client per day. Most other states spend more than $100 per day.)

[11] Virginia Young, *Keeping Sex Predators Locked Up Costs State; Some Lawmakers Seek Ways to Cut $8 Million Earmarked for Care*, ST. LOUIS POST-DISPATCH, April 12, 2005, at B2; Frank Green, *Senator: Fixing the System 'Is Going to Cost Us Money': Task Force Begins*

(Continued on following page)

issue this year, one Representative suggested an alternative to cost-cutting: "Why don't we just put these people back in prison?"[13] By following the Texas approach, states can do just that through civil commitment.

Although states "must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold," *Addington v. Texas*, 441 U.S. 418, 425 (1979) procedures must meet the constitutional minimums. The prevailing attitude towards sex offenders makes them particularly subject to unconstitutional liberty deprivations at the hands of legislatures. When enacting or modifying civil commitment programs, states must know the constitutional limits. The unusually punitive effects of the Texas SVP Act bring the statute well below constitutional minimums. Meaningful judicial review is imperative. If this Court does not grant review, legislatures will have carte blanche to conjure any punitive commitment measures they can imagine.

Looking at Ways to Improve State's Dealings with Sex Offenders, RICHMOND TIMES DISPATCH, June 8, 2005, at B-1; Hurst Laviana, *Growth Strains Predator Program; The Growing Number of Predators in the State's Sexual Predator Program Has Led to a 480 Percent Increase in Costs Since Fiscal 2001*, WICHITA EAGLE (KS), May 29, 2005, at A-1.

[13] Young, *supra*, note 9.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN RE COMMITMENT OF MICHAEL FISHER

NO. 04-0112

SUPREME COURT OF TEXAS

164 S.W.3d 637; 2005 Tex. LEXIS 394; 48 Tex. Sup. J. 684

November 30, 2004, Argued
May 20, 2005, Delivered

COUNSEL: For The State of Texas, Petitioner: Mr. Ryan D. Clinton, Asst. Solicitor General, Austin, TX; Honorable Greg Abbott, Attorney General of Texas, Austin, TX; Mr. Barry Ross McBee, Mr. Edward D. Burbach, Mr. Rafael Edward Cruz, Office of the Attorney General, Austin TX.

For Michael Fisher, Respondent: Mr. Kenneth W. Balusek, Mr. Daniel E. Maeso, Ms. Nelda F. Williams, State Counsel for Offenders, Huntsville, TX; and Ms. Kim B. Vernon, Division Director, Huntsville, TX.

For Special Prosecution Unit, Amicus Curiae: Ms. Autumn Lewis, Special Prosecution Unit, Civil Division, Huntsville, TX.

JUDGES: CHIEF JUSTICE JEFFERSON delivered the opinion of the Court. JUSTICE JOHNSON did not participate in the decision.

OPINION BY: Wallace B. Jefferson

OPINION:

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

A jury determined that Michael James Fisher suffered from a behavioral abnormality that made him likely to engage in a predatory act of sexual violence, and the trial

court ordered Fisher committed pursuant to the *Civil Commitment of Sexually Violent Predators Act* (the "Act"). The court of appeals reversed, holding that the Act was punitive, not civil, and violated Fisher's due process rights. Because we conclude that a commitment proceeding under the Act is civil and that Fisher received the process he was due under the United States and Texas Constitutions, we reverse the court of appeals' judgment and render judgment civilly committing Fisher pursuant to the Act.

I. Civil Commitment of Sexually Violent Predators

Fisher argues that the Act denies procedural and substantive protections to those alleged to be sexually violent predators. To assess the merits of this argument, we must examine how the statute operates with respect to a person adjudged to be a predator under the Act. In 1999, the Legislature enacted the Civil Commitment of Sexually Violent Predators Act, now codified at chapter 841 of the Health and Safety Code. *See* The Civil Commitment of Sexually Violent Predators Act, 76th Leg., R.S., ch. 1188, § 4.01, 1999 Tex. Gen. Laws 4143 (codified as amended at TEX. HEALTH & SAFETY CODE ch. 841). In so doing, the Legislature found that:

> [A] small but extremely dangerous group of sexually violent predators exists and . . . those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence. The legislature finds that the existing involuntary commitment provisions of Subtitle C, Title 7, are inadequate to address the

> risk of repeated predatory behavior that sexually violent predators pose to society. The legislature further finds that treatment modalities for sexually violent predators are different from the traditional treatment modalities for persons appropriate for involuntary commitment under Subtitle C, Title 7. Thus, the legislature finds that a civil commitment procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state.

TEX. HEALTH & SAFETY CODE § 841.001. A sexually violent predator ("SVP") is a "repeat sexually violent offender"[1] who "suffers from a behavioral abnormality that

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[1] A "repeat sexually violent offender" is a person who:

is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses or if:

(1) the person:

(A) is convicted of a sexually violent offense, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the person was subsequently discharged from community supervision;

(B) enters a plea of guilty or nolo contendere for a sexually violent offense in return for a grant of deferred adjudication;

(C) is adjudged not guilty by reason of insanity of a sexually violent offense;

(D) is adjudicated by a juvenile court as having engaged in delinquent conduct constituting a sexually violent offense and is committed to the Texas Youth Commission under Section 54.04(d)(3) or (m), Family Code; and

(2) after the date on which under Subdivision (1) the person is convicted receives a grant of deferred adjudication, is adjudged not guilty by reason of insanity, or is adjudicated by a juvenile court as having engaged in delinquent conduct,

(Continued on following page)

makes the person likely to engage in a predatory act of sexual violence." *Id.* § 841.003(a). A "behavioral abnormality" is "a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person." *Id.* § 841.002(2).

The Act creates a multidisciplinary team to review available records of an SVP candidate. *Id.* § 841.022. The Texas Department of Criminal Justice ("TDCJ") or the Texas Department of Mental Health and Mental Retardation ("TDMHMR") must notify the multidisciplinary team of the anticipated release of a person who is serving a sentence for a sexually violent offense (or who was committed after having been adjudged not guilty by reason of insanity of a sexually violent offense) and who may be a "repeat sexually violent offender." *Id.* § 841.021. Within sixty days of the notice, the team must (1) determine whether the person is a repeat sexually violent offender and whether the person is likely to commit another such offense after release; (2) give notice of that determination; and (3) recommend the assessment of the person for a behavioral abnormality. *Id.* § 841.022(c).

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the person commits a sexually violent offense for which the person:

(A) is convicted, but only if the sentence for the offense is imposed; or

(B) is adjudged not guilty by reason of insanity.

TEX. HEALTH & SAFETY CODE § 841.003. Thus, although the Act uses the term "offender" it includes even those persons adjudged not guilty by reason of insanity. *Id.*

Within sixty days of the team's recommendation, the TDCJ or the TDMHMR, as appropriate, must engage an expert to determine whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. *Id.* § 841.023(a). If the TDCJ or the TDMHMR concludes that the person suffers from a behavioral abnormality, the department must give notice and corresponding documentation to the state's attorney[2] not later than sixty days after receiving the team's recommendation. *Id.* § 841.023(b).

If an SVP candidate is referred to the state's attorney, the attorney may file, in a Montgomery County[3] district court other than a family district court, a petition alleging that the person is a sexually violent predator and stating facts sufficient to support the allegation. *Id.* § 841.041(a). The petition must be filed not later than ninety days after the SVP candidate is referred to the state's attorney, and it must be served as soon as practicable after filing. *Id.* § 841.041(b).

Within 270 days after the petition is served, the judge must conduct a trial to determine whether the person is an SVP. *Id.* § 841.061(a). The alleged SVP has the right to an immediate examination by an expert and to a jury trial. Additionally, the alleged SVP is entitled to appear at the

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[2] The "attorney representing the state" means an attorney employed by the prison prosecution unit to initiate and pursue a civil commitment proceeding under the Act. TEX. HEALTH & SAFETY CODE § 841.002(1).

[3] The Act requires that all SVP petitions be filed in Montgomery County. *Id.* § 841.041(a). Montgomery County is adjacent to Walker County, home to the Texas State Penitentiary at Huntsville.

trial, present evidence, cross-examine witnesses, and view and copy all petitions and reports in the court file. *Id.* §§ 841.061(b)-(d). At all stages of the proceedings, the alleged SVP is entitled to the assistance of counsel, and indigents are appointed counsel by the court.[4] *Id.* § 841.144. A judge or jury then determines whether, beyond a reasonable doubt, the person is an SVP. A jury determination must be unanimous. *Id.* § 841.062.

If a person is adjudged an SVP, the judge must commit the person for outpatient treatment and supervision, to begin on the date of the SVP's release from a correctional facility or discharge from a state hospital and to continue "until the person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence." *Id.* § 841.081. Before entering an order directing an SVP's outpatient civil commitment, the judge must impose on the SVP "requirements necessary to ensure the SVP's compliance with treatment and supervision and to protect the community." *Id.* § 841.082(a). Those constraints include: requiring the SVP to live in a particular location; prohibiting contact between the SVP and victims or potential victims; prohibiting the SVP's use of alcohol, inhalants, or controlled substances; requiring participation in and compliance with a particular course of treatment; requiring the SVP to submit to tracking and refrain from tampering with tracking equipment; prohibiting the SVP from changing residence without prior authorization; and "any other requirements determined necessary by the

[4] In such a case, the court appoints counsel through the Office of State Counsel for Offenders. TEX. HEALTH & SAFETY CODE §§ 841.005, 841.144(b).

judge." *Id.* Violation of one of the commitment requirements is a third-degree felony. *Id.* § 841.085.

The statute provides for biennial expert examinations and judicial review of the committed person's status. *Id.* §§ 841.101, 841.102. Additionally, if the case manager determines that the SVP's behavioral abnormality has changed to the extent that he or she is no longer likely to engage in a predatory act of sexual violence, the case manager must authorize the SVP to petition for release. *Id.* § 841.121(a). Finally, at any time and even absent the case manager's authorization, the SVP has the right to file a petition for release.[5] *See id.* §§ 841.122-24.

In passing the Act, Texas became one of seventeen states that has enacted legislation providing for the civil commitment of sexually violent predators. *See* ARIZ. REV. STAT. §§ 36-3701 to 3717; CAL. WELF. & INST. CODE §§ 6600-6609.3; FLA. STAT. ANN. §§ 394.910-.931; 725 ILL. COMP. STAT. 207/1-99; IOWA CODE §§ 229A.1-.16; KAN. STAT. ANN. §§ 59-29a01 to 29a21; MASS. GEN. LAWS ch. 123A, §§ 1-16; MINN. STAT. §§ 253B.185(1)-(7); MO. ANN. STAT. §§ 632.480-.513; N.J. STAT. ANN. §§ 30:4-27.24 to 27.38; N.D. CENT. CODE §§ 25-03.3-01 to 03.3-23; 42 PA. CONS. STAT. §§ 6401-6409; S.C. CODE ANN. §§ 44-48-10 to 170; VA. CODE ANN. §§ 37.1-70.1-.19; WASH. REV. CODE §§ 71.09.010-.902; WIS. STAT. §§ 980.01-.12. All but Texas have chosen to use inpatient civil commitment, which requires housing the individuals in secure facilities like a prison. Walter J. Meyer, III et al.,

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[5] A petition for release filed without the case manager's authorization, however, is subject to a more stringent standard of review by the trial court. *See* TEX. HEALTH & SAFETY CODE § 841.123.

Outpatient Civil Commitment in Texas for Management and Treatment of Sexually Violent Predators: A Preliminary Report, 47(4) INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 396, 397 (2003). By contrast, the Texas Act requires outpatient "commitment," involving intensive treatment and supervision. *Id.* The Texas Act is also unique in that it imposes criminal penalties for violating the conditions of confinement.[4] *See* TEX. HEALTH & SAFETY CODE § 841.085.

To date, two of our courts of appeals have upheld the Act's constitutionality against various challenges. *In re Commitment of Browning*, 113 S.W.3d 851, 866 (*Tex.App.-Austin 2003, pet. denied*); *Beasley v. Molett*, 95 S.W.3d 590, 609 (*Tex.App.-Beaumont 2002, pet. denied*). A third, the court of appeals in this case, has held that the Act is "manifestly punitive, both facially and as applied," and, therefore, unconstitutional. 123 S.W.3d 828, 850.

II. Background

On January 20, 1987, Michael James Fisher pleaded guilty to second-degree sexual assault and was sentenced

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[4] Some states that utilize inpatient commitment do, however, impose criminal penalties for escape from confinement or leaving the state without permission. *See, e.g.*, FLA. STAT. § 394.927(1) (creating second-degree felony for escape or attempted escape from civil commitment confinement); IOWA CODE § 229A.5B(2) (imposing criminal penalties on individuals who (1) leave or attempt to leave commitment facilities, (2) are absent "from a place where the person is required to be present," or (3) leave or attempt to leave the custody of civil-commitment personnel); MO.REV.STAT. § 575.195 (criminalizing an escape from commitment or detention); VA.CODE § 37.1-70.19 (imposing criminal penalties on committed individuals on conditional release who leave state without permission).

to two years' confinement in the Texas Department of Corrections. While on parole for that conviction, on August 17, 1987, Fisher was again indicted, this time for first-degree aggravated sexual assault. Fisher pleaded guilty to that charge and was sentenced to ten years' confinement. While on parole for that conviction, Fisher was charged with, but not convicted of, assault in June 1996. His parole was revoked at that time. In May 1999, he again violated the conditions of his release, and his parole was once more revoked. On numerous occasions between 1991 and 1996, Fisher was hospitalized for psychiatric problems. On October 25, 2000, the State of Texas petitioned to have Fisher adjudicated a sexually violent predator. Fisher filed a general denial and demanded a jury trial.

A jury was impaneled, and the case proceeded to trial. Fisher moved for a hearing on his competency to stand trial. Outside the presence of the jury, the trial court conducted an evidentiary hearing, in which Fisher's two experts testified that Fisher was mentally incompetent. The first expert, an attorney-psychologist, testified that Fisher lacked a factual or rational knowledge of the proceedings and was unable to assist in his defense. The second, Fred Lanier Fason, M.D., a psychiatrist, agreed that Fisher was incompetent and did not have a present ability to consult with his lawyer with a reasonable degree of rational understanding. The State did not offer controverting evidence. The trial court denied the motion.

At trial, Dr. Fason testified that Fisher suffered from paranoid schizophrenia, antisocial personality disorder, and mild mental retardation. Fason agreed that Fisher's problems with impulse control could be described as "a semi careening down a hill without brakes." Fason testified that Fisher would be a severe danger to others if

released, unless new or different medication proved more effective in curbing his criminal impulses.

Doug Bertling, a licensed psychologist employed by the Sex Offender Treatment Program, testified on behalf of the State. Bertling conducts risk assessments on sex offenders and uses actuarial variables to predict future sexual reoffense. Bertling testified that his office evaluates the approximately fifty sex offenders who are released "to the streets" each week in Texas. Bertling completed two risk assessment evaluations on Fisher: the Static 99 and the MnSOST-R. On the Static 99, Fisher received a score of four, which placed him in the high risk category for future sexual reoffense. Fisher scored a ten on the MnSOST-R, indicating a seventy percent recidivism level.

Dr. Billy Burleson, a licensed psychologist, also testified on behalf of the State. Burleson interviewed Fisher and concluded that Fisher suffered from antisocial personality disorder.[7] According to Burleson, individuals suffering from this disorder have no conscience, no respect for legal authority, are self-centered, and tend to have a higher sex drive than others. Burleson also testified that Fisher suffered from paranoid schizophrenia; he did not consider himself guilty of his sexual offenses and claimed the victims accused him wrongly. In Burleson's opinion, "due to his mental illness and mental retardation, Fisher's insight and judgment are considered highly unreliable." Burleson recommended that Fisher be considered for indefinite civil commitment upon his release. In Burleson's

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[7] Burleson testified that antisocial personality disorder was formerly known as psychopathy, and that they "mean[] the same thing."

opinion, there was a high probability that, "given the opportunity, [Fisher] would likely offend again." According to Burleson, Fisher needed close supervision and monitoring and would benefit from working with a case worker. Burleson testified that Fisher was the type of individual likely to commit a predatory act in the future, and it was significant to Burleson that Fisher violated his parole and raped another woman while on parole.

Dr. Lisa Kay Clayton, a forensic psychiatrist, also testified on behalf of the State. She agreed that Fisher was schizophrenic, suffered from antisocial personality disorder, and was borderline mentally retarded. According to Clayton, while Fisher was an inpatient at Rusk State Hospital, he tried to kick out a window, threatened to beat an officer to death, and threatened to rape and strangle a nurse. Clayton testified that Fisher had a very high likelihood of reoffending, and agreed with Fason's analogy that Fisher was like a "large truck going downhill with no brakes." She testified that medication and a very structured, monitored environment might provide "brakes" for Fisher. In her opinion, if Fisher stayed on his medication, he had a high likelihood of success in complying with the civil commitment requirements.

The trial court admitted certified copies of Fisher's two penitentiary packets detailing his 1987 sexual assault and aggravated sexual assault convictions. At the close of evidence, on the State's motion, the trial court directed a verdict that Fisher was a repeat sexually violent offender as defined in the Act. After deliberating for approximately two-and-a-half hours, the jury unanimously found, beyond a reasonable doubt, that Fisher suffered from a behavioral abnormality that made him likely to engage in a predatory act of sexual violence.

The trial court made findings of fact and conclusions of law and rendered judgment on June 12, 2001. The judgment ordered Fisher committed to treatment and supervision by the Council on Sex Offender Treatment. The judgment imposed several requirements on Fisher: he must live at a residence approved by his case manager; he is prohibited from participating in programs involving children or going within 1000 feet of premises where children commonly gather; he must be fitted with satellite monitoring equipment; he must provide blood and hair samples to the State's DNA Data Bank; he must not contact the victims of his crimes; he must reside in Texas and must not leave the state without court authorization; he must not consume alcohol or controlled substances; and he must "comply with all terms and conditions of this court, his treatment provider and case manager and enter into a written agreement with his treatment provider and case manager specifying all of the terms and conditions of his treatment and case management including as are attached in Civil Commitment Requirements: Treatment and Supervision Contract." An unsigned copy of the Treatment and Supervision Contract is appended to the judgment and contains some ninety-seven additional conditions by which Fisher must abide.

Fisher moved for a new trial, asserting that the trial court abused its discretion in denying his request that a jury determine his competency to stand trial, depriving him of substantive and procedural due process. After a hearing, the trial court denied the motion.

Fisher appealed, contending that the Act was punitive, both facially and as applied, because he did not have the mental ability to understand or comply with the commitment order. Second, Fisher argued that his due

process rights were violated because he was forced to proceed to trial when he was incompetent. The court of appeals, sitting en banc with one justice dissenting, agreed with Fisher, concluding that the Act was punitive and that "Fisher was denied substantive and procedural due process." 123 S.W.3d at 850-851. It held that Fisher was entitled to rights under the criminal law, including the right to effectively exercise his right to counsel and the right to be competent at trial. *Id.* at 850. Additionally, the court of appeals concluded that "substantive due process requires [that Fisher] be mentally competent to comply with the order of commitment." *Id.* Because the court of appeals "only addressed Fisher's complaints concerning his mental incapacity," it did not reach Fisher's other complaints.[4] *Id.* at 831-32. We granted the State's petition for review to address several aspects of the Act's constitutionality. 47 Tex. Sup. Ct. J. 1028 (Sept. 3, 2004).

III. Constitutional Challenges

It is unclear whether the court of appeals based its decision on the United States Constitution, the Texas Constitution, or both. *See, e.g.*, 123 S.W.3d at 837, 850. Where, as here, the parties have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent, we limit our analysis to the United States Constitution and assume that its concerns are congruent with those of the Texas Constitution. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144,

[4] Fisher also alleged that the statute and commitment order were unconstitutionally vague and that requiring him to testify violated his fifth amendment privilege against self-incrimination. 123 S.W.3d at 831.

150, 47 Tex. Sup. Ct. J. 1140 (Tex. 2004). An analysis of the constitutionality of a statute begins with a presumption of validity. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629, 39 Tex. Sup. Ct. J. 858 (Tex. 1996).

A. Due Process

In determining Fisher's competency-related due process rights, we must first examine whether the Act is punitive, not civil, as the court of appeals held. 123 S.W.3d at 850; *see also Kansas v. Hendricks*, 521 U.S. 346, 360-69, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997) (evaluating whether Kansas statute was civil or criminal to determine validity of SVP's double jeopardy and *ex post facto* claims). While the criminal trial of an incompetent defendant violates due process, *see Medina v. California.*, 505 U.S. 437, 453, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992); *McDaniel v. State*, 98 S.W.3d 704, 709 (Tex. Crim. App. 2003) ("The conviction of an accused person while he is legally incompetent violates due process."), generally civil cases may proceed even if one party is incompetent, *see, e.g.*, TEX. HEALTH & SAFETY CODE § 576.001(3); *Stubbs v. Ortega*, 977 S.W.2d 718, 722 (Tex. App. – Houston 1998, pet. denied). "The same concerns and concomitant protections that arise in a criminal case do not necessarily arise in the SVP[] area," and "this principle is key to the determination of whether [an SVP] holds a fundamental right to be competent during the SVP[] proceedings." *In re Cubbage*, 671 N.W.2d 442, 447 (Iowa 2003). Competency claims can raise both substantive and procedural due process concerns. *Walton v. Angelone*, 321 F.3d 442, 459 (4th Cir. 2003); *Gilbert v. Mullin*, 302 F.3d 1166, 1178 (10th Cir. 2002).

In *Kansas v. Hendricks*, the United States Supreme Court upheld the constitutionality of a Kansas statute providing for inpatient civil commitment of sexually violent predators.[9] 521 U.S. at 371. The Court recognized that while freedom from physical restraint has always been at the core of the liberty the *due process clause* protects, that liberty interest is not absolute and may be overridden even in the civil context. *Id.* at 356.

> Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety. *See, e.g.*, 1788 N.Y. Laws, ch. 31 (Feb. 9, 1788) (permitting confinement of the "furiously mad"); see also A. Deutsch, The Mentally Ill in America (1949) (tracing history of civil commitment in the 18th and 19th centuries); G. Grob, Mental Institutions in America: Social Policy to 1875 (1973) (discussing colonial and early American civil commitment statutes). We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards. *See Foucha, supra, at 80; Addington v. Texas*, 441 U.S. 418, 426-27, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979). It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty.

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[9] The court of appeals stated, incorrectly, that *Hendricks* was a "plurality opinion." 123 S.W.3d at 839. Five justices joined the opinion, making it the opinion of the Court. *Hendricks*, 521 U.S. at 348 ("THOMAS J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined.").

Id. at 357. The Court examined the Kansas act and noted that it was "of a kind" with other civil commitment statutes: It required a finding of future dangerousness and then linked that finding to the existence of a "mental abnormality" or "personality disorder" that made it difficult, if not impossible, for the person to control his or her dangerous behavior. *Id.* at 358. Thus, the Court concluded that the Kansas statute's definition of "mental abnormality" satisfied substantive due process requirements. *Id.* at 360. The Court also determined that the Kansas SVP statute was civil and therefore "comported with due process requirements and neither [ran] afoul of double jeopardy principles nor constituted an exercise in impermissible *ex post facto* lawmaking." *Id.* at 371.

Relying on *Hendricks*, courts in fourteen states have determined that their SVP civil commitment schemes are civil, not criminal. *See In re Leon G.*, 204 Ariz. 15, 59 P.3d 779, 782 (Ariz. 2002); *Hubbart v. Superior Court*, 19 Cal. 4th 1138, 81 Cal. Rptr. 2d 492, 969 P.2d 584, 606-11 (Cal. 1999); *Westerheide v. State*, 831 So.2d 93, 103 (Fla. 2002); *In re Det. of Samuelson*, 189 Ill.2d 548, 727 N.E.2d 228, 234-35, 244 Ill. Dec. 929 (Ill. 2000); *In re Det. of Garren*, 620 N.W.2d 275, 279-83 (Iowa 2000); *In re Hay*, 263 Kan. 822, 953 P.2d 666, 673 (Kan. 1998);

Commonwealth v. Bruno, 432 Mass. 489, 735 N.E.2d 1222, 1230-32 (Mass. 2000); *In re Linehan*, 594 N.W.2d 867, 870, 878 (Minn. 1999); *In re Gibson*, ___ S.W.3d ___, ___, 2004 Mo. App. LEXIS 513 (Mo. Ct. App. 2004); *In re Civil Commitment of J.H.M.*, 367 N.J. Super. 599, 845 A.2d 139, 144 (N.J. Super Ct. App. Div. 2003); *In re M.D.*, 1999 ND 160, 598 N.W.2d 799, 805-06 (N.D. 1999); *In re Matthews*, 345 S.C. 638, 550 S.E.2d 311, 316-17 (S.C. 2001); *In re Det. of Turay*, 139 Wn.2d 379, 986 P.2d 790,

812-13 (Wash. 1999); *In re Commitment of Rachel*, 2002 WI 81, 254 Wis. 2d 215, 647 N.W.2d 762, 777-78 (Wis. 2002); *see also State v. Bellamy*, 178 N.J. 127, 835 A.2d 1231, 1237 (N.J. 2003) (holding that legislative intent behind SVP act was regulatory, not punitive); *McCloud v. Commonwealth*, 269 Va. 242, 609 S.E.2d 16, 21 (Va. 2005) (noting that "a proceeding under the SVPA is a civil one").

1. Legislative Intent

In determining whether a statute is civil or criminal, a court must first ascertain whether the legislature intended the statute to establish civil proceedings. "Determining the civil or punitive nature of an Act must begin with reference to its text and legislative history." *Seling v. Young*, 531 U.S. 250, 262, 148 L. Ed. 2d 734, 121 S. Ct. 727 (2001). "A court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" *Hudson v. United States*, 522 U.S. 93, 99, 139 L. Ed. 2d 450, 118 S. Ct. 488 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980)). A court will reject the legislature's manifest intent only where a party challenging the Act provides "'the clearest proof'" that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention. *Hendricks*, 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248-49). Because a court first examines legislative intent then proceeds to review the statutory effects, this process has become known as the "intent-effects test." *See Moore v. Avoyelles Corr. Ctr.*, 253 F.3d 870, 872 (5th Cir. 2001). The categorization "'is first of all a question of statutory construction,'" and if the Legislature meant to establish civil proceedings, we generally defer to the legislature's

stated intent. *Hendricks*, 521 U.S. at 361 (quoting *Allen v. Illinois*, 478 U.S. 364, 368, 92 L. Ed. 2d 296, 106 S. Ct. 2988 (1986)).

The Texas statute refers to a "civil commitment procedure," much like the Kansas statute at issue in *Hendricks*. *See id.*; TEX. HEALTH & SAFETY CODE § 841.001. Additionally, the legislative findings state that public safety and treatment – not punishment – are the primary statutory goals. *See id.* § 841.001 (citing legislative finding that "a civil commitment procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state"); *Hendricks*, 521 U.S. at 383 (Breyer, J., dissenting) ("We have generally given considerable weight to the findings of state and lower federal courts regarding the intent or purpose underlying state officials' actions. . . . "). Unquestionably, the Legislature gave the Act a civil edifice.

2. Statute's Purposes and Effects

Although this "civil label is not always dispositive," *Allen*, 478 U.S. at 369, we will reject the legislature's manifest intent only if Fisher provides "'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Hendricks*, 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248-49). In making this determination, the Supreme Court has relied on the "useful guideposts" identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963). *Hudson*, 522 U.S. at 99. These factors, while "neither exhaustive nor

dispositive,"[10] *Ward*, 448 U.S. at 249, include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Kennedy*, 372 U.S. at 168-69. It is important to note, however, that these factors "may often point in differing directions" and "must be considered in relation to the statute on its face." *Id.* at 169.

a. Affirmative Disability or Restraint

The Texas Act imposes no physical restraint and therefore "does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith v. Doe*, 538 U.S. 84, 100, 155 L. Ed. 2d 164, 123 S. Ct. 1140 (2003). Nonetheless, the Act imposes affirmative disabilities on Fisher. He must reside at a particular location, may not leave Texas without permission, must be fitted with satellite monitoring equipment, and faces a host of restrictions on his activities. *See id.* at 99-100 (noting that appropriate inquiry is "how the effects of the Act are felt by those subject to it"). Even in light of such restraints, however, the Supreme Court in *Hendricks* concluded that "the mere fact that a person is detained

[10] In determining that the Kansas SVP Act at issue in *Hendricks* was civil, the Supreme Court considered some, but not all, of the *Kennedy* factors. *See Hendricks*, 521 U.S. at 361-69.

does not inexorably lead to the conclusion that the government has imposed punishment." *Hendricks*, 521 U.S. at 363 (internal quotation omitted). While the Act imposes affirmative disabilities and restraints on Fisher, they are certainly no greater than the inpatient commitment held to be civil in *Hendricks*. Accordingly, in light of *Hendricks*, this factor alone does not compel a conclusion that the statute is punitive.

b. Historical View

Thus, we turn to the second *Kennedy* factor. Historically, civil commitment has not been viewed as punishment. "The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded." *Hendricks*, 521 U.S. at 363. The United States Supreme Court has, in fact, cited the confinement of "'mentally unstable individuals who present a danger to the public' as one classic example of nonpunitive detention." *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 748-49, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)); *see also Addington v. Texas*, 441 U.S. 418, 428, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979) ("In a civil commitment state power is not exercised in a punitive sense."). As the *Hendricks* Court noted: "If detention for the purpose of protecting the community from harm *necessarily* constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held."[11] *Hendricks*, 521 U.S. at

[11] In Texas, our constitution authorizes the Legislature to enact laws providing for commitment of certain individuals. *See* TEX. CONST. art. I, § 15-a ("The Legislature may enact all laws necessary to

(Continued on following page)

363. In view of civil commitment's historical purpose, this factor weighs against a finding of punitive effect.

c. Retribution, Deterrence, and Scienter

Moreover, like the Kansas statute at issue in *Hendricks*, "commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." *Id.* at 361-62. The Act is not retributive because it does not fix liability for prior criminal conduct. *Hendricks*, 521 U.S. at 362. Instead, such conduct is used for evidentiary purposes, either to demonstrate that a "behavioral abnormality" exists or to support a finding of future dangerousness. *Id.* In addition, like the Kansas statute, the Act does not make a criminal conviction a prerequisite for commitment – "persons absolved of criminal responsibility may nonetheless be subject to confinement under the Act." *Id.; see also* TEX. HEALTH & SAFETY CODE § 841.003(b)(1)(C); *Browning*, 113 S.W.3d at 861. This "absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed." *Hendricks*, 521 U.S. at 362. "Thus, the fact that the Act may be 'tied to criminal activity' is 'insufficient to render the statute [sic] punitive.'" *Id.* (quoting *United States v. Ursery*, 518 U.S. 267, 292, 135 L. Ed. 2d 549, 116 S. Ct. 2135 (1996)).

Additionally, the Act lacks the scienter requirement typically found in criminal statutes. In *Hendricks*, the Court recognized that "the existence of a scienter requirement is customarily an important element in distinguishing

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provide for the trial, adjudication of insanity and commitment of persons of unsound mind. . . .").

criminal from civil statutes," and "the absence of such a requirement . . . is evidence that confinement under the statute is not intended to be retributive." 521 U.S. at 362. In this case, the court of appeals held that "scienter sandwiches the second prong of the statute," which requires a finding that a person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. 123 S.W.3d at 843. But this was precisely the situation in *Hendricks*, and the Court in that case held that "no finding of scienter is required to commit an individual who is found to be a sexually violent predator; instead, the commitment determination is made based on a 'mental abnormality' or 'personality disorder' rather than on one's criminal intent." *Hendricks*, 521 U.S. at 362; *see also id.* at 352, (quoting Kansas statute which defined "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence"). The court of appeals incorrectly focused on the scienter required for a conviction of an underlying sexually violent offense, making an individual eligible for SVP commitment, rather than on whether scienter is required in the SVP commitment proceeding itself. *See, e.g., Rodriguez v. State*, 93 S.W.3d 60, 73 (Tex. Crim. App. 2002) (sex offender registration statute did not require scienter, because "although a culpable mental state may be required with respect to some of the underlying offenses, this does not answer the question of whether the registration statute requires a culpable mental state"); *Hubbart*, 969 P.2d at 606-07 ("Even though prior criminal conduct was required for classification and commitment as a sexual predator, the statute did not 'affix culpability' or

require a finding of 'criminal intent.'") (quoting *Hendricks*, 521 U.S. at 362)). We conclude that no finding of scienter is required to commit an individual found to be an SVP under the Texas Act.[12]

Like the Kansas statute at issue in *Hendricks*, it cannot be said that the Texas Act was intended to function as a deterrent. As in Kansas, "those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement." *Hendricks*, 521 U.S. at 362-63. Moreover, the conditions surrounding confinement do not suggest a punitive purpose on the State's part. In *Hendricks*, the Court considered that individuals confined under the Kansas statute were not subject to the more restrictive conditions placed on state prisoners but instead experienced essentially the same conditions as any involuntarily committed patient in the state mental institution. *Id.* at 363; *see also Browning*, 113 S.W.3d at 861 ("We note that any incidental, marginal deterrent effect of Texas's outpatient-treatment and monitoring scheme will necessarily be less than any deterrence effected by Kansas's scheme of confinement."). In Texas, committed SVP's face conditions less restrictive than those in Kansas, where SVP's live in secure facilities within prison grounds. While some deterrence may result from the Texas Act, an incidental deterrent effect will not make the statute punitive: "any

[12] As more fully explained below, however, scienter would be required if an SVP were charged with violating a condition of commitment, but this inquiry is separate from whether scienter is required to civilly commit an SVP.

number of governmental programs might deter crime without imposing punishment." *Smith*, 538 U.S. at 102. "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation. . . ." *Hudson*, 522 U.S. at 105.

The court of appeals held that the Texas Act was punitive due, in part, to the differences between SVP commitment proceedings and "conventional" mental health commitment. 123 S.W.3d at 845-46. The court noted that a person committed via conventional commitment proceedings is confined for "at most" one year. *Id.* at 844; *see also* TEX. HEALTH & SAFETY CODE § 574.066(f). By contrast, an SVP is entitled only to biennial review of his or her status. 123 S.W.3d at 845; *see also* TEX. HEALTH & SAFETY CODE § 841.102. But this reasoning not only overlooks the SVP's right to file an unauthorized petition for release at any time, *see* TEX. HEALTH & SAFETY CODE § 841.123, but the *Hendricks* holding that potentially indefinite commitment did not evidence punitive intent. *Hendricks*, 521 U.S. at 363. "If, at any time, the confined person is adjudged 'safe to be at large,' he is statutorily entitled to immediate release." *Id.* at 364 (quoting KAN. STAT. § 59-29a07). The Texas Act provides similar protection. *See* TEX. HEALTH & SAFETY CODE §§ 841.081, 841.121 (commitment ends when SVP's behavioral abnormality "has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence" and case manager must authorize petition for release at that time). Moreover, "the Constitution does not require [a state] to write all of its civil commitment rules in a single statute or forbid it to write two separate statutes each covering somewhat different classes of

committable individuals." *Hendricks*, 521 U.S. at 377 (Breyer, J., dissenting). In Texas, the legislature explicitly found that "the existing involuntary commitment provisions" were inadequate to address the risk of repeated predatory behavior by SVP's. TEX. HEALTH & SAFETY CODE § 841.001. Thus, we cannot conclude that differences between SVP outpatient commitment and other mental health commitment necessarily establish a punitive purpose on the State's part.

d. Whether the Act Applies to Behavior Already a Crime

A statute that applies to behavior that is already a crime is more likely to be characterized as punitive. *See Kennedy*, 372 U.S. at 168; *see also Rodriguez*, 93 S.W.3d at 74 (noting that sex offender registration statute applied only to "defendants" who had "reportable convictions"). In this case, the Act defines "repeat sexually violent offender" to include both individuals convicted of sexually violent offenses and those adjudged not guilty by reason of insanity. TEX. HEALTH & SAFETY CODE § 841.003(b)(1)(A), (C). Because the Act does not categorically apply only to convicted individuals, this factor does not weigh in favor of finding that the Act is punitive.

e. Rational Connection to Nonpunitive Purpose

The Act's rational connection to a nonpunitive purpose is a "most significant" factor in determining whether the statute's effects are punitive or civil. *Ursery*, 518 U.S. at 290. The United States Supreme Court has "repeatedly held that the Government's regulatory interest in community safety

can, in appropriate circumstances, outweigh an individual's liberty interest." *Salerno*, 481 U.S. at 748. It has "also held that the government may detain mentally unstable individuals who present a danger to the public." *Id.* at 748-49. Thus, the State's interest is twofold: "The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 U.S. at 426. Our Court has acknowledged these dual interests. *See State v. Turner*, 556 S.W.2d 563, 566, 20 Tex. Sup. Ct. J. 510 (Tex. 1977) ("The State, as parens patriae undertakes the beneficent task of treating the mentally ill, and under its police power protects the public from harm. These are valid, necessary state objectives which should not be thwarted. . . .").

The Act furthers these interests. In *Hendricks*, the Supreme Court recognized that Kansas's "overriding concern" was the "continued segregation of sexually violent offenders," a purpose "consistent with [the] conclusion that the Act establishes civil proceedings, especially when that concern is coupled with the State's ancillary goal of providing treatment to those offenders, if such is possible." *Hendricks*, 521 U.S. at 366 (quoting *In re Hendricks*, 259 Kan. 246, 912 P.2d 129, 136 (Kan. 1996)). In Texas, the legislature found that "a small but extremely dangerous group of sexually violent predators exists," predators whose behavioral abnormalities were "not amenable to traditional mental illness treatment modalities" and were "likely to engage in repeated predatory acts of sexual violence." TEX. HEALTH & SAFETY CODE

§ 841.001. Thus, the Act is rationally connected to its twin goals of "long-term supervision and treatment." *Id.*

f. Excessiveness

Finally, we examine whether the Act "appears excessive in relation" to its purpose. *Kennedy*, 372 U.S. at 169. The court of appeals held that the Act failed the excessiveness inquiry because the "100-plus disabilities [in the Treatment and Supervision Contract] are not tailored to [Fisher's] individual needs but rather represent a net cast to the broadest reach of possible variables." 123 S.W.3d at 846. The United States Supreme Court did not discuss the excessiveness factor in deciding that the Kansas SVP Act was civil. *See Hendricks*, 521 U.S. at 361-71. *But see id.* at 394 (Breyer, J., dissenting) ("I believe the Act . . . is excessive in relation to any alternative purpose assigned."). In a different case, however, the Supreme Court noted:

> The excessiveness inquiry . . . is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The Act meets this standard.

Smith v. Doe, 538 U.S. at 105. The Court has clarified that this factor alone should not be dispositive. *Hudson*, 522 U.S. at 101.

While the Texas Act is strikingly similar to the Kansas statute upheld in *Hendricks*, there is a notable difference. The Texas SVP scheme is unique in that it provides for outpatient commitment and, perhaps consequently, imposes severe criminal penalties for violating a condition of

confinement. We must determine whether the criminal penalty provision sufficiently tips the statute into the punitive realm. The statute at issue in *Hendricks* required "secure" confinement and "'incarceration against one's will.'" *Hendricks*, 521 U.S. at 379 (Breyer, J., dissenting) (quoting *In re Gault*, 387 U.S. 1, 50, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967)) (citing record testimony demonstrating that confinement took place in the psychiatric wing of the prison hospital where those whom the Act confined and ordinary prisoners were treated alike); *see also Seling*, 531 U.S. at 259 (detailing Washington SVP scheme in which SVP's were committed to a "Center, located wholly within the perimeter of a larger Department of Corrections (DOC) facility, [and which] relied on the DOC for a host of essential services, including library services, medical care, food, and security"). Indeed, according to one report, at least fourteen of the seventeen states with SVP civil commitment procedures mandate commitment in a secure facility. *See* Washington State Institute for Public Policy (2004), State by State Comparison of the Civil Commitment of Sexually Violent Predators, at http://www.tdh.state.tx.us /hcqs/plc/csot_svpchart.doc (last visited May 18, 2005 and available in Clerk of Court's file); *see also In re Det. of Garren*, 620 N.W.2d at 281-82.

By contrast, the Texas Act permits the SVP to live at large in the community. Should the SVP violate one of the commitment requirements, however, the offense is a third-degree felony.[13] TEX. HEALTH & SAFETY CODE

[13] This criminal penalty is separate from the initial commitment proceedings. *See, e.g., Smith v. Doe*, 538 U.S. 84, 101-02, 155 L. Ed. 2d 164, 123 S. Ct. 1140 (2003) (noting that "[a] sex offender who fails to comply with the reporting requirement may be subjected to a criminal

(Continued on following page)

§ 841.085. Thus, the Texas Act appears at once less restrictive and potentially more restrictive than its out-of-state counterparts. On the whole, however, the freedom from confinement outweighs the criminal sanction imposed for a failure to obey the commitment conditions. For example, in Texas, unlike other states, many civilly committed SVP's are permitted to live at home with their families. *See Walter J. Meyer, III* et al., *Outpatient Civil Commitment in Texas for Management and Treatment of Sexually Violent Predators: A Preliminary Report*, 47(4) INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 396, 401 (2003). Moreover, the United States Supreme Court has never held that the imposition of criminal penalties for violating a civil regulatory scheme ipso facto renders an act punitive, rather than civil. *See, e.g., Smith*, 538 U.S. at 90, 105-06 (holding that Alaska Sex Offender Registration Act was civil even though a knowing failure to comply would subject the offender to criminal prosecution); *Hawker v. New York*, 170 U.S. 189, 192-94, 200, 42 L. Ed. 1002, 18 S. Ct. 573 (1898) (holding that New York statute prohibiting felons from obtaining licenses to practice medicine did not violate ex post facto clause, despite criminal penalties imposed for failure to comply: "such legislation is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled"). "While [a Texas SVP's] liberty is indeed restrained, the intrusion is far less restrictive than if he were confined in a secure facility in Kansas. And yet the Supreme Court found commitment under the Kansas act to be civil in

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prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense").

nature." *Browning*, 113 S.W.3d at 859 (citing *Hendricks*, 521 U.S. at 360-69. *But see Commonwealth v. Williams*, 574 Pa. 487, 832 A.2d 962, 985-86 (Pa. 2003) (holding that criminal penalties imposed for violating Pennsylvania's Registration of Sexual Offenders Act were unconstitutionally punitive). We conclude that the criminal penalties attaching to a violation of a commitment requirement, when considered in relation to the statutory purpose and alongside the other *Kennedy* factors, do not make the commitment scheme punitive. *See, e.g., Ursery*, 518 U.S. at 290 (deeming law nonpunitive despite "punitive aspects").

Fisher has not provided "the clearest proof" that the statute's effects are punitive. Instead, taken together, *Kennedy's* "useful guideposts" point to a conclusion that a commitment proceeding under the Act is a civil matter. Accordingly, we now turn to Fisher's contention that due process guaranteed him the right to be competent at trial.

B. Competence

The court of appeals held that the statute was punitive and, therefore, Fisher had the right to be competent at trial. 123 S.W.3d at 850. Because the Act is civil, however, an SVP who may be incompetent to stand trial on criminal charges can nonetheless be civilly committed pursuant to chapter 841. *See In re Commitment of Martinez*, 98 S.W.3d 373, 376 (Tex. App.-Beaumont 2003, pet. denied) ("Due process does not require a separate competency hearing in a civil commitment proceeding under Chapter 841."); *see also In re Detention of Cubbage*, 671 N.W.2d 442, 447 (Iowa 2003) (concluding that alleged SVP "does not have a fundamental right to be competent during his SVPA proceedings"); *State v. Kinder*, 129 S.W.3d 5, 10 (Mo. Ct.

App. 2003) ("Subjecting a suspected sexually violent predator to a statutory sexually violent predator determination, regardless of competency, is not an unconstitutional deprivation of liberty."). This comports with legislative intent, as the legislature contemplated that not all alleged SVP's would be mentally competent. The definition of a sexually violent offender – a necessary prerequisite to an SVP determination – includes someone who "is adjudged not guilty by reason of insanity of a sexually violent offense."[14] TEX. HEALTH & SAFETY CODE § 841.003(b)(1)(C); *see also id.* §§ 841.003(b)(2)(B), 841.081 (commitment begins on date SVP is released from correction facility or is "*discharged from a state hospital*") (emphasis added). Moreover, this result is consistent with *Hendricks* – the Kansas statute applied to persons who were charged with a sexually violent offense but found incompetent to stand trial. *Hendricks*, 521 U.S. at 352. Indeed, "the very nature of civil commitments is that they commit for treatment those who pose a danger to themselves or others because they suffer from a mental disease or defect and are unable to comprehend reality or to respond to it rationally." *Kinder*, 129 S.W.3d at 8. Because "involuntary commitment does not itself trigger the entire range of criminal procedural protections," *Allen*, 478 U.S. at 372, we conclude that Fisher was not entitled to a competency determination prior to his SVP trial.

We note, however, that while the initial commitment proceeding is civil, a prosecution for violating a condition

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[14] For this reason, we also disagree with the court of appeals' holding that "multiple prior sexually violent *convictions* are a fundamental and jurisdictional requirement of the act." 123 S.W.3d at 841 (emphasis added).

of commitment is undoubtedly criminal. *See* TEX. HEALTH & SAFETY CODE § 841.085. In such a proceeding, Fisher would be entitled to the full array of rights available to all criminal defendants. Thus, if Fisher were charged with such a violation, his competency could be determined at that time. *See, e.g.*, TEX.CODE CRIM. PROC. ch. 46B. Moreover, the State concedes that, at any such criminal trial, the State would have to prove scienter on the SVP's part. *See, e.g.*, TEX. PEN.CODE § 6.02. If, as he argues, Fisher's incompetence dooms him to violate the court's commitment order, Fisher may raise lack of scienter as a defense in any such criminal proceeding.

C. Fifth Amendment

The self-incrimination clause of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The United States Supreme Court "has long held that the privilege against self-incrimination 'not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Allen*, 478 U.S. at 368 (quoting *Minnesota v. Murphy*, 465 U.S. 420, 426, 79 L.Ed.2d 409, 104 S. Ct. 1136 (1984)).

Before Fisher testified, his attorney objected on the basis of Fisher's privilege against self-incrimination. Although the trial court overruled the objection, the court noted that, if Fisher were to blurt out some subsequent unlawful act he committed, the trial court would either

excise the testimony from the record or grant Fisher immunity. Fisher did not object to any individual question. On appeal, Fisher points to no question that subjected him to future criminal liability nor to any incriminating testimony on his part. Fisher's brief complains that Fisher was required to give a deposition, but the record contains no such deposition. We hold that Fisher's Fifth Amendment challenge lacks merit.

D. Vagueness

Fisher did not preserve a vagueness challenge in the trial court. The State contends that Fisher waived the point; Fisher responds that facial constitutional challenges need not be preserved at the trial court level, and he purports to assert such a challenge. Assuming without deciding that Fisher may do so,[15] we address his facial challenge to the Act. To prevail on his facial vagueness challenge, Fisher bears the heavy burden of showing that the Act is unconstitutional in every possible application. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982); *Tex. BollWeevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 461 n.5, 40 Tex. Sup. Ct. J. 523 (Tex. 1997). "Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is

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[15] We have recognized that "the general rule against facial vagueness challenges is relaxed when the assertedly vague statute has the potential to affect First Amendment freedoms." *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 438, 41 Tex. Sup. Ct. J. 1250 (Tex. 1998). Although Fisher asserts that "First Amendment rights are implicated" in his vagueness challenge, his three vagueness complaints do not appear to involve speech or conduct protected by the First Amendment.

often offset by losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of 'premature interpretation[] of statutes' on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 158 L. Ed. 2d 891, 124 S. Ct. 1941, 1648 [sic] (2004) (quoting *United States v. Raines*, 362 U.S. 17, 22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)).

A statute prohibiting conduct that is not sufficiently defined is void for vagueness. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437, 41 Tex. Sup. Ct. J. 1250 (Tex. 1998). Fisher contends that the Act is void for vagueness, for three reasons. First, he complains that, unlike other states' SVP statutes, *see, e.g.*, ARK. CODE ANN. §§ 12-12-917, 12-12-918, the Act does not individualize treatment; that is, "no risk levels are assigned to the SVPs so that levels of restrictions and treatment may be adjusted according to individual needs and capacity to comply with requirements." While Fisher is correct that the Act does not specify that risk levels be assigned, the Act gives the trial court leeway to fashion restrictions tailored to the particular SVP facing commitment. *See, e.g.*, TEX. HEALTH & SAFETY CODE § 841.082(a) (requiring judge to impose on SVP any requirements "necessary to ensure the person's compliance with treatment and supervision and to protect the community"). Thus, we cannot agree that the absence of risk levels prohibits individualized treatment and renders the Act unconstitutionally vague.

Second, Fisher asserts that the Act is vague because it predicates commitment on a "behavioral abnormality" rather than a "medically recognized and diagnosable

mental illness." The Texas legislature defined behavioral abnormality as:

> a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.

TEX. HEALTH & SAFETY CODE § 841.002(2). This definition is virtually identical to the Kansas statute's definition of "mental abnormality," a definition that the United States Supreme Court has held "satisfies 'substantive' due process requirements."[18] *Hendricks*, 521 U.S. at 356; *see also* KAN. STAT. ANN. § 59-29a02(b) (defining "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others"); *Beasley v. Molett*, 95 S.W.3d 590, 597 (Tex. App.-Beaumont 2002, pet. denied) (holding that the Texas Act's "behavioral abnormality" requirement was "virtually the same" as the "mental abnormality" definition examined in *Hendricks*). Moreover, the United States Supreme Court has "never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, [it has] traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Hendricks*, 521 U.S. at 359. We conclude that Fisher has failed to demonstrate

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[18] In fact, eight justices agreed that the definition of "mental abnormality" in the Kansas act satisfied substantive due process requirements. *See Hendricks*, 521 U.S. at 373 (Breyer, J., dissenting).

that the Act's behavioral abnormality definition is unconstitutionally vague in every application.

Finally, Fisher contends that the provisions of his "Treatment and Supervision Contract" appended to the judgment are unconstitutionally vague, allowing arbitrary enforcement. The Treatment and Supervision Contract proscribes a broad spectrum of conduct, some of it apparently reasonable (Fisher cannot contact his victims and must live in a prescribed location), some of it less so (Fisher must not "walk or ride around aimlessly" or "sit and watch people"). This challenge, however, is not that the statute is unconstitutional on its face, but rather that the statute *as applied to Fisher* via the conditions of his commitment contract – is unconstitutionally vague.[17] Other than his competency and fifth amendment issues, Fisher did not raise any constitutional challenges in the trial court. As a rule, a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal, so that the trial court has the opportunity to rule on the issue. *See* TEX. R. APP. P. 33; *Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861, 44 Tex. Sup. Ct. J. 672, 44 Tex. Sup. Ct. J. 767 (Tex. 2001). Had Fisher so requested, it is possible that the trial court would have modified or removed some of the contract conditions of which he now complains. Because Fisher did not assert this claim in the trial court, we do not reach Fisher's as-applied vagueness challenge.

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[17] Under an "as applied" challenge, the challenging party contends that the statute, although generally constitutional, operates unconstitutionally as to him or her because of the challenging party's particular circumstances. *Lewellen*, 952 S.W.2d at 461 n.5.

IV. Conclusion

We conclude that the Act is civil and that, therefore, due process does not require, as in a criminal proceeding, that Fisher be competent to stand trial. We also conclude that Fisher's fifth amendment and facial vagueness challenges lack merit. We reverse the court of appeals' judgment and render judgment civilly committing Fisher to supervision and treatment as outlined in the trial court's final judgment and order of commitment. *See* TEX. R. APP. P. 60.2(c).

Wallace B. Jefferson

Chief Justice

THE COMMITMENT OF MICHAEL FISHER, Appellant, v. THE STATE OF TEXAS, Appellee.

NUMBER 13-01-00714-CV

COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS CHRISTI

123 S.W.3d 828; 2003 Tex. App. LEXIS 10697

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COUNSEL: FOR APPELLANT: Hon. Kenneth W. Balusek, Civil Commitment Services, Hunstville, TX.

FOR APPELLEE: Hon. Autumn Lewis, Special Prosecution, Hunstville, TX.

JUDGES: Opinion by Justice Wittig.[1] Justice Castillo Dissenting.

OPINION BY: Don Wittig

OPINION:

Before the Court En Banc

Opinion by Justice Wittig

Michael Fisher appeals his indeterminate commitment. The commitment was under the relatively new *Texas Sexual Violent Predator Act*, effective September 1, 1999. Fisher raises four complaints; two are issues of first impression. First he attacks the sexually violent predator statute (SVP) as punitive, both facially and as applied,

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[1] Retired Justice Don Wittig assigned to this court by the Chief Justice of the Supreme Court of Texas pursuant to TEX. GOV'T CODE ANN. § 74.003 (Vernon Supp. 2004).

because Fisher does not have the mental ability to understand or comply with the order of commitment. Second, Fisher argues his due process rights were violated when he was forced to proceed to trial when he was incompetent. His argument includes the contention he was denied the opportunity to exercise his right to counsel. We will treat the competency issues generally together.[2] In his third issue, he attacks the SVP statute and commitment order as unconstitutionally vague. Finally, Fisher claims his fifth amendment privilege against self-incrimination was violated because Fisher was compelled to testify against himself.[3]

We will only address Fisher's complaints concerning his mental incapacity. Unchallenged psychiatric and psychological testimony showed both Fisher's inability to understand the proceedings against him, and his inability to cooperate with his attorney in his own defense. Fisher also argues his entitlement to a competency hearing before being subjected to a trial as a sexually violent predator. We agree. Because we reverse and remand on the competency issues, we do not address his other complaints.

I

The State of Texas filed a petition in District Court in Montgomery County, Texas, to commit Michael Fisher as a

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[2] These issues are likely intertwined under the United States Supreme Court's holding in *Seling v. Young*, 531 U.S. 250, 263-64, 148 L. Ed. 2d 734, 121 S. Ct. 727 (2001) (if a statute is already held to be a civil statute, then the statute cannot be unconstitutional "as applied").

[3] The Beaumont Court of Appeals has recently addressed these latter issues in a plurality opinion which we discuss and reference below.

sexually violent predator. Fisher requested a hearing to determine his competency to stand trial. The motion asserted that Fisher had neither a sufficient present ability to consult with counsel with a reasonable degree of rational understanding, nor a rational as well as factual understanding of the proceedings against him. The motion further stated Fisher was an inpatient at the Institutional Division of the Texas Department of Criminal Justice when the petition was filed. While at the mental facility, Fisher had episodes of psychotic behavior and was diagnosed with schizophrenia, paranoid type, and antisocial personality disorder. Fisher was also said to be at least mildly retarded. The assigned visiting trial judge initially granted the motion for a competency hearing. The trial court then denied the motion for competency hearing but liberally allowed a bill of exception.

In the offer of proof, two mental health experts testified. Fred Fason, M.D., a psychiatrist, graduated from Baylor University College of Medicine, and was a World War II veteran. He had been court appointed for clinical evaluations some 2000 times. Dr. Fason testified Fisher was "totally unable to cooperate and communicate with [his attorney] and engage him in legal activities." The doctor stated Fisher had neither a factual nor rational understanding of the proceedings against him. Dr. Fason further testified Fisher was mildly retarded, with an I.Q. in the lower 60's. Fisher's paranoia would lower his scores, and schizophrenia lowered his cognitive abilities. According to the psychiatrist, Fisher in no way could conform to the terms of a treatment program, and was doomed to failure if he were put on outpatient treatment. Dr. Fason's descriptions of Fisher included paranoia, schizophrenia, delusional and psychotic. "His view of himself and of his

situation is so unrealistic that it's psychotic." Fisher was not capable of reading the MMPI,[4] which requires a sixth grade education to accomplish. While Fisher could spell "house," he could not spell "table" or "judge." Finally Dr. Fason testified that Fisher thought the present proceedings were "about trying to send me to a half-way house." According to the testimony, Fisher thought he would have to sign for the program and, because he would refuse to sign, he would then be released. Dr. Fason opined there was no way Fisher could stand trial competently.

The State neither cross-examined Dr. Fason nor otherwise challenged his testimony.

Dr. Floyd Jennings, psychologist and attorney, also testified Fisher lacked both factual and rational knowledge of the proceedings. Dr. Jennings further testified Fisher was unable to assist his attorney in preparation of his defense. Dr. Jennings also had expertise in sex treatment programs. He stated that sex treatment programs are verbally intensive, and require a modicum of intellect to effectively participate; this ability is lacking in Fisher. He is incapable of participating and benefitting from a program for sex offender treatment "because he could not understand what is asked of him." According to Dr. Jennings, to order Fisher to participate in a sex treatment program is virtually a sham. "[A] word 'sham' seems too strong, but it would be one wherein the defendant or the patient would be anticipated to fail because he could not understand what is asked of him."

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[4] Minnesota Multiphasic-II. Although Fisher thought he could read and write at an eighth grade level, medical testimony indicated it was more like a fourth grade level-illustrated by Fisher's inability to read the test.

The State offered a limited cross-examination of Dr. Jennings. Dr. Jennings opined that he thought of Fisher as dangerous to himself primarily and, secondarily, to a lesser extent, dangerous to others under the conventional commitment law. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 574.034-.035. (Vernon 2001). Dr. Jennings admitted he disagreed with the State's attorney regarding commitment of sexually violent predators. Dr. Jennings also offered an alternative to sexually violent predator commitment. Dr. Jennings suggested Fisher should be given protective custody and emergency detention under the conventional civil commitment laws. Fisher could then be properly treated at Vernon State Hospital.

After Fisher's proffer of proof, the trial court observed that neither Chapter 841 of the Health and Safety Code, nor any other provision in the civil law gives leave to a competency determination, before going forward with trial on the issues under Chapter 841. This oral pronouncement is verified by the court's order dated May 29, 2001. The trial court concluded that a determination of competency to stand trial is neither required nor appropriate. The court observed: "I think the very nature of the proceeding it may well be if the legislative intent is to be followed that frequently there will be respondents who are not, in the sense of a criminal proceeding, competent to stand trial." Indeed, we agree with the trial court's studied conclusion that mental competency is not required by the statute.

At trial, the 36-year old Fisher was called to the stand for testimony by the State and cross-examined about his prior convictions and other misdeeds. The two prior felony convictions that enabled the State to seek commitment were sexual assaults. Both offenses occurred in 1987 and he pled guilty to both. Fisher claimed these offenses were

with prostitutes who wanted more money, that he was not guilty, but other factors prompted his plea. Fisher violated his community supervision three times and was re-incarcerated. During probation he assaulted his wife. However, none of the probation violations were sexually related. One of the violations included his removal of a satellite monitoring device, not unlike the device he now wears. A jury found Fisher was a sexually violent predator. The trial court signed and entered a final judgment and order of commitment. The judgment requires Fisher, in addition to not contacting his two 1987 victims, not to participate in programs with persons 17 or younger, to stay 1000 feet from where children commonly are, not to consume alcohol or controlled substances, and not to leave Texas or to change his home residence without court approval, *inter alia*. Fisher was also ordered, upon release from lock-down, to be fitted with electronic satellite monitoring equipment by the Texas Department of Public Safety for around the clock monitoring. There are 11 disabilities and restrictions under the judgment and 97 more under the commitment requirements.

The "civil commitment requirements" expand the disabilities and restrictions of the final judgment and order of commitment. These additional restraints consist of 97 separate requirements of Fisher's "treatment and supervision contract." The second and fourth paragraphs of the judgment's commitment order incorporate these additional restraints by ordering: "Michael Fisher shall follow the directive of his case manager in matters related to his residence selection and rules." The civil commitment requirements are also attached and incorporated into the final judgment.

We observe a few of the provisions from the civil commitment requirements.[8] Fisher is forbidden to have *contact with* or harass program staff or volunteers. Many rules require his cooperation with his case manager and staff as well as adherence to any future treatment plans. Contact with family members is forbidden unless approved by the case manager and staff. Family members may be required to submit to criminal background checks. R-rated movies or TV programs are forbidden unless discussed with case manager and staff. Fisher may not go to schools, swimming pools, movie theaters, public libraries, amusements parks, arcades, or malls where children or potential victims are likely to be. He cannot work anywhere that requires contact with women or children. Fisher may not touch anyone without their permission. Fisher may not use drugs or drink any alcohol. Fisher may not buy, borrow, steal, possess, or use cameras, recorders, CD or DVD recorders, or any other recording device. He cannot use a post office box, pick up hitchhikers, or stop to render aid to someone stranded on a road. He cannot use an automobile or travel without permission. He must constantly wear a tracking device and submit to polygraph tests. There is no confidentiality[9] of anything he tells counselors. Conversely, Fisher may not disclose the identity

[8] Copies of the judgment, order of commitment and civil commitment requirements (exhibit C to the judgment) are attached as Appendix 1 to this opinion.

[9] Some database information is confidential. Other provisions require attendance with counseling and detail sexual conduct restraints ranging from sadomasochism to masturbation to deviant fantasies. The listing above is not in the least inclusive. Only some of the 97 additional requirements are mentioned to illustrate the breadth and depth of liberty interests involved and disabilities imposed under the law.

of anyone in the program. Finally, Fisher must report any violation by him to his case manager.

II

Fisher challenges whether due process applies to a SVP proceeding. If due process applies, then the procedural and substantive safeguards of due process cannot be enjoyed by a person who cannot rationally or factually comprehend the hearing. Fisher argues from *Addington:* "This Court has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas,* 441 U.S. 418, 425, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979).

Fisher further observes other proceedings analogous to SVP proceedings trigger due process protections because they too can result in loss of liberty. *See In re M.A.F.,* 966 S.W.2d 448, 450, 41 Tex. Sup. Ct. J. 451 (Tex. 1998). Because contempt proceedings are quasi-criminal they trigger due process concerns. *Hawkins v. Walvoord,* 25 S.W.3d 882, 892 (Tex. App. – El Paso 2000, *pet. denied*). Additionally, a hearing for protective order in a divorce case involves liberty issues because a person's freedom of movement is restricted. This process too is a quasi-criminal proceeding implicating due process. *Striedel v. Striedel,* 15 S.W.3d 163, 166 (Tex. App. – Corpus Christi, 2000 *no pet.*). Fisher posits that all these proceedings can result in the deprivation of liberty. The SVP proceedings result in deprivation of liberty because a person so committed is greatly disabled from going places and contacting people – even family members. Every aspect of his life is affected, from his every movement to each personal contact.

Fisher further contends due process requires a person to be aware of and be able to participate in the proceedings against him. The proof showed Fisher was unable to understand or assist his attorney in preparation for trial or the trial itself. His appellate counsel argues, though Fisher was granted the right to have an attorney and attend his trial, "since Fisher was incompetent, that right was a hollow right."

Finally, Fisher argues from *Thompson v. Cockrell*, 263 F.3d 423, 427 (5th Cir. 2001). Due process dictates protection of the individual against arbitrary action of the state and ensures that adequate procedure exists to protect a substantive interest to which a person is entitled. *See id.* We also are reminded by *Thompson* that liberty interests emanate from either the Due Process Clause itself or from state law. *Id.* at 425. The State concurs that substantive due process prevents the government from engaging in conduct that "shocks the conscience," citing *Rochin v. California*, 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (1952). Due process prevents governments from interfering with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26, 82 L. Ed. 288, 58 S. Ct. 149 (1937). We agree.

The State expands its due process argument by citing *Allen v. Illinois*, 478 U.S. 364, 372, 92 L. Ed. 2d 296, 106 S. Ct. 2988 (1986). "*Addington* demonstrates that involuntary commitment does not itself trigger the entire range of criminal protections." *Id.* The State argues that the SVP statute is not quasi-criminal because the United States Supreme Court has consistently held such statutes to be *civil* in nature, citing *Kansas v. Hendricks*, 521 U.S. 346, 361-65, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *Seling v. Young*, 531 U.S. 250, 260-61, 148 L. Ed. 2d 734, 121 S. Ct.

727 (2001); and *Allen*, 478 U.S. at 372. The State says that the Chapter 841 rights given to Fisher from the criminal law do not change the statute from civil to criminal. We agree that the granting of rights associated with criminal trials, standing alone, does not make the statute criminal. The State also argues that giving some safeguards applicable in criminal trials does not turn the proceedings into criminal prosecutions requiring the full panoply of rights applicable in criminal proceedings. It cites *Allen*, 478 U.S. at 372. However *Allen* also notes that the fact incarceration may result (which is uniquely the case in Texas) is relevant to the question whether the privilege against self-incrimination applies. *Id.* We also note that Allen's commitment, unlike Fisher's commitment, was for actual treatment at a psychiatric hospital. *Id.* at 373. So the gist of the State's position boils down to its argument, that the SVP statute is civil, therefore not quasi-criminal or criminal. Accordingly, the State contends Fisher has no due process right in being sane at his hearing or being able to assist counsel at the commitment hearing. We disagree.

We first address Fisher's liberty and due process claims, then undertake the issue of whether or not the statute is punitive.

There is no question that Fisher has a liberty interest in his commitment proceedings. Both substantive and procedural due process are mandatory. In *Foucha*, the State of Louisiana sought to perpetuate Foucha's confinement on the basis of his antisocial personality that rendered him a danger to himself or others. *Foucha v. Louisiana*, 504 U.S. 71, 78, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992). The court first observed that even if constitutionally permissible, keeping Foucha against his will in a mental institution is improper absent a civil commitment

proceedings of *current mental illness* and dangerousness. *Id.* (Texas makes no requirement of current mental illness and dangerousness.) A convicted felon has a liberty interest in not being transferred to a mental institution without appropriate procedures to prove he is mentally ill. *Id.* at 78-79. A convicted criminal who allegedly was mentally ill was entitled to release at the end of his term unless the State committed him in a civil proceeding. *Id.* at 79 (citing *Baxstrom v. Herold,* 383 U.S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760 (1966)). "[T]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Jackson v. Indiana,* 406 U.S. 715, 724, 32 L. Ed. 2d 435, 92 S. Ct. 1845 (1972) (quoting *Baxstrom,* 383 U.S. at 111-112). Due process contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch,* 494 U.S. 113, 125, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990); *see also Salerno, supra,* 481 U.S. at 746; *Daniels v. Williams,* 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). Freedom from bodily restraint has always been at the core of the liberty protected by due process from arbitrary governmental action. *Youngberg v. Romeo,* 457 U.S. 307, 316, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982). "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States,* 463 U.S. 354, 361, 77 L. Ed. 2d 694, 103 S. Ct. 3043 (1983). We should never "minimize the importance and fundamental nature" of the individual's right to liberty. *Salerno,* 481 U.S., at 750; *Foucha,* 504 U.S. at 79-80.

Texas's highest criminal court recently held, together with the majority of states, that to give effect to a

petitioner's right to counsel and his right to test the legality of his arrest in the extradition context, he must be sufficiently competent to consult with his counsel. *Ex parte Potter,* 21 S.W.3d 290, 296-97 (Tex. Crim. App., 2000). "Given that an alleged fugitive is entitled to counsel and entitled to challenge the legality of his arrest and assert defenses on the basis of which the extradition warrant may be dismissed, the accused must be sufficiently competent to discuss with his counsel facts relating to the limited defenses that may be raised." *Id.* (citations omitted); *cf. Ake v. Oklahoma,* 470 U.S. 68, 77, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985) (due process requires the state to grant indigent access to basic materials integral to building of effective defense). "Counsel cannot provide effective representation absent the ability to consult with the alleged fugitive regarding potential defenses about which he may have knowledge." *Ex parte Potter,* 21 S.W.3d at 297. "Where the fugitive's incompetence prevents him from being able to consult with his counsel in connection with the issues of his identity and presence, those defenses may be foreclosed." *Id.* The court concluded that while the broadest understanding of the proceedings and greater ability to consult with counsel is not necessary, due process requires that the alleged fugitive has sufficient mental competency to consult with and assist counsel on the issues of identity and presence.

The Supreme Court in *Dexter v. Hall,* 82 U.S. 9, 21 L. Ed. 73 (1872), held that a mental incompetent cannot be held to his contract:

> [A] person non compos mentis, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as

> such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, therefore, should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent.

Id. at 20. So we ask, if a person cannot contract away his property without mental capacity, can the government force an incompetent to sign a civil commitment contract the person cannot comprehend or keep? May mentally retarded persons sign away their liberties? Fisher was ordered to sign such a contract.

In Texas, a person such as Fisher, suffering from a mental illness, is guaranteed all the rights, benefits, responsibilities and privileges afforded by the constitutions and laws of the United States and Texas. *Barclay v. Campbell,* 704 S.W.2d 8, 11, 29 Tex. Sup. Ct. J. 124 (Tex. 1986) (citing TEX. REV. CIV. STAT. ANN. art. 5547-80(a) (Vernon Supp. 1985) (Barclay's mental illness did not foreclose his right to be informed of material risk that could influence a reasonable person in making a decision to give or withhold consent to a medical procedure)).

We have held that the standard for incompetence to determine whether a person is mentally ill, mentally retarded, or both, did not violate due process where each category protects equally. *Villarreal v. State,* 860 S.W.2d 529, 535 (Tex. App. – Corpus Christi 1993, *pet. ref'd*). In *Villarreal,* the portions of the statute that deal with the

conditions of mental illness or retardation disjunctively, are those that refer to institutional placement and treatment options. *Id.* The standard for incompetence is the same whether the person is mentally ill, mentally retarded, or both, under conventional civil commitments. *Id.* Yet the Texas SVP act, while facially claiming to be a civil commitment statute, does not afford the equal protection of the conventional civil commitment act. To the contrary, the act does not provide for the mentally ill or mentally retarded. Thus the act meets neither the due process requirements for those mentally ill or retarded, nor does it meet the due process requirements of the criminal law. Additionally, the law fails to meet constitutional muster as a true civil commitment because of the absence or any lack-of-control determination. *Kansas v. Crane,* 534 U.S. 407, 412, 151 L. Ed. 2d 856, 122 S. Ct. 867 (2002).[7] The law fails to meet constitutional muster as a criminal statute because it fails to follow criminal procedures for the allegedly mentally incompetent. TEX. CODE CRIM. PROC. ANN. § 46.03 (Vernon 2001). In other words, the Texas SVP act, as noted by the trial judge and the State, does not provide for mental incompetency, although many liberties are affected. Thus, the mentally incompetent is deprived of both treatment under the conventional mental health laws, and of the protections of certain criminal rights. Yet the Texas law lacks the United States Supreme Court-mandated finding that the offender cannot control his sexual impulses. According to the United States Supreme Court, If offenders could control their sexual deviancies, they would be subject to the criminal law. *Crane,* 534 U.S. at 412 (sexual offenders subject to civil

[7] We discuss some of the implications of *Crane* below.

commitments must be distinguished from other dangerous persons more properly dealt with in the criminal proceedings).

Because the SVP statute provides for assistance of counsel, due process requires a person to be able to enjoy that protected right. *Little v. Streater,* 452 U.S. 1, 16, 68 L. Ed. 2d 627, 101 S. Ct. 2202 (1981) ("[A] statute . . . may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question."). According to the record, Fisher lacked factual and rational knowledge of the proceedings and was unable to assist his attorney [sic] prepare a defense. "[A] State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut,* 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). We hold that the unchallenged lack of mental competency to assist his attorney deprived Fisher of a meaningful opportunity to be heard. *See Powell,* 579 F.2d at 330; *Ex parte Potter,* 21 S.W.3d at 296-9. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965); *Grannis v. Ordean,* 234 U.S. 385, 394, 58 L. Ed. 1363, 34 S. Ct. 779 (1914).

We conclude that whether the SVP is civil or quasi-criminal, Fisher's liberty interests in a fair proceeding, including his statutory right to counsel, were violated. His due process rights were violated because competent evidence indicated his incapacity both to participate in the proceeding in an effective way and his demonstrated

inability to factually or rationally utilize his right to counsel.

III

Next we address the State's contention that the SVP statute is a purely civil statute and therefore does not afford many criminal due process guarantees to Fisher.[8] At the same time, we address Fisher's related issue that the statute is punitive facially, and as applied, because Fisher does not have the mental ability to understand or comply with the order of commitment. Furthermore, if the statute is punitive, then there are additional reasons why Fisher clearly has the right to be sane at his hearing, able to assist counsel, and is entitled to a hearing on competency before proceeding.

The State argues, and we agree, that the "as applied" argument may not apply if the SVP statute is civil. The argument is by extrapolation. The United States Supreme Court in construing the Washington SVP statute, held that such an act could not be unconstitutional "as applied" when that state's supreme court and the Ninth Circuit had already held the statute to be civil in nature. *Seling*, 531 U.S. at 264-65[9] (in context of double jeopardy and *ex post*

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[8] The SVP statute grants several criminal law safeguards, including findings beyond a reasonable doubt, the right to counsel at the proceeding stage (but not the initiation phase) and trial by jury. By omission, the act denies the safeguards against double jeopardy, *ex post facto* application, the right of mental competency, and the right against self-incrimination. *See generally Beasley v. Molett*, 95 S.W.3d 590 (Tex.App. – Beaumont 2002, *no pet. h.*).

[9] The Court also noted the Washington commitment scheme was similar and largely patterned on the Kansas statute. *Id.* As we will discuss, the Texas scheme is also similar to Kansas but contains very

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facto claims, "as applied" analysis would prove unworkable because such analysis would never conclusively resolve which particular scheme is punitive). The State argues: "If Fisher were subjected to the criminal penalty clause, he would then be afforded all of the procedural safeguards offered to criminal defendants." Texas criminal law clearly proscribes the trial of a mentally incompetent person. Thus, if the Texas SVP statute is punitive in purpose or manifest effect, Fisher is entitled to a competency hearing before proceeding to the initial commitment trial.

The State expands its ripeness argument countering Fisher's claim that he is doomed to violate the terms of commitment because he cannot understand the orders. Citing *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 41 Tex. Sup. Ct. J. 1001 (Tex. 1998), the State argues that uncertain or contingent future events may not occur. *See Id.* at 442. The proper course for Fisher is to challenge the criminal penalty clause after that portion has been applied to him. While the State's argument is not without some merit, it ignores the thrust of Fisher's argument. Fisher argues the SVP act is objectively punitive and retributive in multiple aspects, not merely because it attaches felony penalties. Alternatively, if the State is correct that *Seling* prohibits an "as applied" analysis after a statute has been found to be civil, then Fisher could be prohibited from raising this argument later after being criminally charged. *See Seling*, 531 U.S. at 264-265.[10]

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significant differences leading to our conclusion that, unlike Kansas, the Texas SVP statute is designed for retribution or deterrence (punitive).

[10] The State is correct Fisher could claim insanity at the time of the violation of the criminal penalty clause, but as we discuss below, lack of

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Both parties aptly cite and argue from *Hendricks*, 521 U.S. 346, 138 L. Ed. 2d 501, 117 S. Ct. 2072.[11] We are constrained to note that *Hendricks* is a plurality opinion by Justice Thomas, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. Justice Kennedy filed a concurrence and warned that mental and medical treatment should not be a sham for punishment. Justices Breyer, Stevens, Souter and Ginsburg dissented to parts of the majority opinion. The State argues, and we agree, that the Kansas law is similar to the Texas SVP statute. However, we note striking and material differences, best exemplified by following the *Hendricks* analysis and its application of the *Kennedy* factors. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963).

The categorization of a statute or proceeding as civil or criminal is first of all a question of statutory construction. *Hendricks*, 521 U.S. at 361. If the Legislature meant to establish "civil" proceedings, we should ordinarily defer to its intent unless there is the clearest proof that the scheme is so punitive in purpose or effect that it negates the State's attempt to deem that statute civil. *Id.* (citing *United States v. Ward*, 448 U.S. 242, 248-49, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980)).[12] Unlike the face of the

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competency at the initial commitment hearing would probably be no defense.

[11] The State's argument largely tracks *Hendricks*. Where it expands on the *Hendricks* holding, we trust we fully address its arguments.

[12] It should be noted that the origin of this expression is *Flemming v. Nestor*, 363 U.S. 603, 617, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960). In context, *Flemming* warns against judicial inquiry into Congressional motives – at best hazardous – especially when that inquiry goes behind

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Kansas statute, which suggested only the creation of a civil statute, the face of the Texas statute imposes severe criminal penalties for the violation of any of the terms of commitment. TEX. HEALTH & SAFETY CODE ANN. § 841.085 (Vernon 2000). The criminal penalty facially provides: "A person commits an offense if the person violates a requirement imposed under Section 841.082. An offense under this section is a felony of the third degree." *Id.* Because Fisher, and most all prisoners,[13] have two prior felony convictions in order to invoke the act, they automatically fall under Texas' felony enhancement scheme. Thus, under Texas law, virtually any conviction of violation of the SVP act mandates a minimum penitentiary

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objective manifestations. But in upholding termination of social security benefits, the Court noted this was but a small part of an extensive revision of social security program. *Id.* The Court held that a punitive desire to punish could not be shown to have motivated the legislature to revise the law and terminate certain benefits. "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." *Id.* at 618 (citing *Fletcher v. Peck*, 10 U.S. 87, 128, 3 L. Ed. 162). Taking heed, we look solely and only at stated intentions and *objective manifestations*. We note, however, that the *Flemming* Court found that no affirmative disability or restraint was imposed, and certainly nothing approaching the "infamous punishment" of imprisonment. *Id.* at 617.

[13] The statute requires the commitment proceedings commence while a person twice convicted of a sexually violent crime is still incarcerated (thus a prisoner). Likewise a person found not guilty of a sexually violent crime by reason of insanity is then subject to SVP commitment before he is released from his civil commitment. *See* § 841.021 *et seq.*, TEX. HEALTH & SAFETY CODE ANN (Vernon 2000). If an insane person no longer shown to be insane, were then committed under the SVP statute and did not have two prior sexual felony convictions, then a member of that limited class would not be subject to the felony sentencing *enhancement* requirements. Such a person would still be subjected to felony criminal penalties.

term of 25-99 years. TEX. PEN. CODE ANN. § 12.42(d) (Vernon 1999). A mandatory life sentence follows the conviction for any violation of § 841.085 of the Health and Safety Code if the committed person is previously convicted of aggravated sexual assault. *Id.* § 12.42(c)(2)(B)(ii). In practical legal effect, if Fisher or anyone with a prior aggravated sexual assault conviction, uses a post office box or stops to help a person "stranded on the road" that person is subject to a mandatory life sentence.[14] The effect of disobedience to the SVP statute, requiring imprisonment for up to life, clearly embraces the primary objectives of criminal punishment: retribution and deterrence. It is retributive because it punishes for past criminal conduct. It is also patently a deterrent; a violation of the terms of commitment could mean between 25 years incarceration up to and including a mandatory life sentence. While the Texas act, like Kansas, initially states it is a civil act providing for civil commitment proceedings, unlike Kansas, the teeth of the Texas law are severe criminal penalties. This objective manifestation of the law is punitive.

We are not informed of any state that attaches felony penalties to its SVP statute, except Texas.

The State argues that if Fisher were indicted for violating any provision of the SVP statutes, he would then be "afforded all of the safeguards offered to persons facing criminal charges." Such argument begs the question of Fisher's rights at the proceeding in question. A promise of possible future protection does little to address the deprivation of present rights. Any prospective insanity defenses

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[14] See items number 48 and 55 respectively of the "Civil Commitment Requirements: Treatment and Supervision Contract," Appendix "A."

would only address his mental state at the time of a violation or his subsequent criminal trial. We know of no Texas law that would allow a person's mental disabilities at the time of his SVP commitment hearing to be a defense to subsequent prosecution. Certainly the SVP statute provides no such protections.

Hendricks notes that Kansas places its SVP statute in its probate code, not its criminal code, thus evidencing intent of the civil nature of the statute. *Hendricks*, 521 U.S. at 362. In somewhat similar fashion, Texas places its SVP statute in its Health and Safety Code. Unlike Kansas, Texas also places some of its highest priority crimes in its Health and Safety Code. Many felony and misdemeanor drugs crimes are found in the Health and Safety Code Chapters 481, 482, 483 and 485. These chapters delineate hundreds of criminal offenses, including manufacturing and distribution of controlled substances, dangerous drugs and abusable chemicals. Several other chapters of the Health and Safety Code deal with criminal statutes and penalties. These include: Chapters 195, 341, 501, 765 and 793, *inter alia*. We conclude that the code placement in Texas does not necessarily implicate the act as civil, and rather is consistent with the placement of other criminal laws.[15] The manifest punitive intent of many provisions of the Health and Safety Code is apparent.

Like Kansas, the Texas act states it is civil. *See Hendricks*, 521 U.S. at 361. The Texas Legislature found "that a civil commitment procedure for the long-term

[15] Indeed, the SVP statute in Chapter 841, immediately follows Chapter 828, which deals with the sterilization of cats and dogs. Certainly few would be so emboldened to argue this statutory nexus is material.

supervision and treatment of sexually violent predators is necessary and in the interest of the state." TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2001). However, "It is well settled that realities rather than benign motives or non-criminal labels determine the relevance of constitutional policies." *In re Winship*, 397 U.S. 358, 365-366, 25 L. Ed. 2d 368, 90 S. Ct. 1068, 51 Ohio Op. 2d 323 (1970); *In re Gault*, 387 U.S. 1, 21, 27, 50, 18 L. Ed. 2d 527, 87 S. Ct. 1428, 40 Ohio Op. 2d 378, (1967); *Breed v. Jones*, 421 U.S. 519, 528, 44 L. Ed. 2d 346, 95 S. Ct. 1779 (1975); *Allen*, 478 U.S. at 369.

The *Hendricks* Court held that the Kansas Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. *Hendricks*, 521 U.S. at 361-62. According to our highest court, Kansas law is not retributive because prior criminal conduct is used solely for evidentiary purposes to show mental abnormality or to support a finding of future dangerousness. *Id.* at 352. Texas law decidedly differs. The Texas SVP statute begins and ends with criminal penalties. First, multiple prior sexually violent convictions are a fundamental and jurisdictional requirement of the act. Section 841.003(b) provides: "A person is a repeat sexually violent offender for the purposes of this chapter if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses or. . . ."[16] TEX. HEALTH & SAFETY CODE ANN. § 841.003(b) (Vernon

[16] Other circumstances including those involving *nolo contendere* pleas, juveniles and persons found not guilty of sexually violent crimes by virtue of insanity are also delineated as alternative required jurisdictional basis before proceedings may be initiated under the statute.

2000). Without two or more prior sexually violent convictions or the statutory equivalent, no proceedings may be initiated. *Id.* The statute further specifies the jurisdiction of either the Texas Department of Criminal Justice, or the Texas Department of Mental Health and Mental Retardation, to file appropriate notices sixteen months before the release of a convicted or committed violent sex offender. *Id.* § 841.021(c). Unlike the *Hendricks* Court holding that past conduct is used "solely for evidentiary purposes," past criminal conduct is a *sine qua non* for the initiation of Texas proceedings. Likewise, the nature of past criminal conduct is jurisdictional not only as to agency responsibility but also before any trial court can entertain such an action.

It is instructive to note *Hendricks* reliance on *Allen*, 478 U.S. at 371. *Allen* in turn relies on the Illinois Supreme Court holding in *People v. Allen*, 107 Ill. 2d 91, 481 N.E.2d 690, 481 N.E.2d 699, 89 Ill. Dec. 847 (Ill. 1985). There, the Illinois court construed its SVP statute as requiring proof of three separate elements: (1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the commission of sex offenses; and (3) the existence of demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children. *Id.* at 697. Because the Illinois statute required more than propensity to commit a sex offense, that state required additional proof that the defendant has "demonstrated" this propensity. *Id.* Thus, the State had to prove at least one act or attempted act of sexual assault or sexual molestation. *Id.* "There is, however, nothing in the statute requiring the State to prove multiple sex crimes. One purpose of the statute is to prevent mentally ill persons from being held criminally responsible for crimes

committed while mentally ill." *Id.* "We therefore hold that the plural language of the statute – 'acts of sexual assault or acts of sexual molestation' – refers to the defendant's future propensities, not to the demonstrated conduct." *Id.* Texas law vastly differs. Rather than to prevent mentally ill persons from being held criminally responsible for crimes committed while mentally ill, Texas makes no provision for traditional mental illness for persons such as Fisher, and facially makes them criminally responsible for violating their commitment orders. TEX. HEALTH & SAFETY CODE ANN. § 841.085 (Vernon 2000). Therefore, the statute ends with criminal punishment as we observed. Texas law begins with criminal punishment because it requisites proof of multiple sex crimes. *Id.* § 841.003. Contrary to *Hendricks*, multiple criminal convictions are the usual prerequisite for commitment. *Cf. Hendricks*, 521 U.S. at 362, The Supreme Court concluded, "An absence of the necessary criminal responsibility suggest [sic] that the State is not seeking retribution of a past misdeed." *Id.* Conversely, logic dictates our conclusion that the presence of the necessary criminal responsibility suggests another objective manifestation that the State is seeking retribution of past misdeeds. Moreover, were the State not seeking general deterrence of future criminal acts, why pass the law at all?[17]

The State argues the absence of scienter noted in *Hendricks*. *Id.* at 362. Ordinarily, absence of scienter is

[17] If the State's true intent was to treat Fisher, why was he not offered or required to undergo treatment before his release from prison? And now after his release from his incarceration and mental institution, he is not given the alternative of inpatient or other mental health treatment. Rather, under the judgment, his alternative to the 100-plus terms of commitment is a life sentence in the penitentiary.

evidence the statute is not intended to be retributive. *Id.* In Texas, scienter sandwiches the second prong of the statute. While the State argues that scienter is not a required finding, perhaps in the second prong of the statute, scienter would trigger its enforcement provisions. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.085 (Vernon 2000). Furthermore, scienter is also typically required by law in order to order to [sic] establish the first prong. *Id.* § 841.003. The law states:

> (a) A person is a sexually violent predator for the purposes of this chapter if the person:
>
> (1) is a repeat sexually violent offender; and
>
> (2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.

Id. Typically, a repeat sexually violent offender would include a conviction of sexual assault which requires scienter. TEX. PEN. CODE ANN. § 22.011. Likewise aggravated sexual assault requires scienter. *Id.* § 22.021. Notably, perhaps the more egregious indecency-with-a-child statute, requires no scienter. *Id.* § 21.11(a)(1). Whether or not the felony penalty provisions of the SVP act *require* scienter, remains to be determined. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.085 (Vernon 2000) (person commits a felony if the person violates a requirement of the act). However, there can be little doubt that a "knowing and intentional" violation of the terms of commitment is a felony offense. *Id.*[18] We conclude the application of the first prong of the act typically requires a

[18] To reiterate, no decisions as of this writing inform us whether an unintentional violation will likewise trigger this felony provision.

prior finding of scienter and, similarly, the enforcement criminal penalties clearly attach with a knowing violation of the terms of commitment.

We also believe there is merit in Fisher's argument regarding the required finding under the second prong. Specifically, the fact finder must find beyond a reasonable doubt that the person will commit an act for the purpose of victimization directed toward a stranger, casual acquaintance, or a person in a relationship established for the purpose of victimization. *Id.* § 841.002(5). An act committed for a "purpose," clearly connotes scienter.

Even assuming *arguendo,* a partial absence of this hallmark of scienter, such absence does not and cannot distinguish the Texas statute as civil. On balance, the Texas act's multiple requirements of scienter, objectively characterize the statute as punitive.

We likewise note another of the *Kennedy* factors not particularly addressed in *Hendricks.* That is the fact that the behavior to which the act applies is already a crime. *Kennedy,* 372 U.S. at 168. As we just noted, the first prong deals with past criminal activity. The second prong of the SVP act requires the likelihood of committing a predatory act of sexual violence, i.e., will commit an act for the purpose of victimization. Thus, most would perceive yet another objective manifestation of the punitive nature of the act.

The *Hendricks* Court also notes that under the Kansas act, a confined individual is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. *Hendricks,* 521 U.S. at 363. Rather, the Texas

law places 108 restraints and disabilities on Fisher. Fisher is fitted with satellite monitoring equipment by an arm of law enforcement, the Department of Public Safety. Law enforcement electronically monitors him every moment of every day. He is subject to repeated polygraph examinations. He is required to give blood and hair samples for DNA profiling. He cannot leave the state and shall not consume alcohol or controlled substances. He must notify his case manager within 48 hours of any change in health or job. He may not move his home without court approval. Other disabilities, already noted, include: any contact with family members forbidden unless approved by the case manager and staff; family members may be required to submit to criminal background checks; R-rated movies or TV programs are forbidden unless discussed with case manager and staff; Fisher must stay more than 1000 feet away and may not go to schools, swimming pools, movie theaters, public libraries, amusement parks, arcades or malls where children or potential victims are likely to be (even though he is not a pedophile); he cannot work anywhere that requires contact with women or children; Fisher may not touch anyone without their permission; Fisher may not buy, borrow, steal, possess or use cameras, recorders, CD or DVD recorders or any other recording device; he cannot use a post office box, pick up hitchhikers or stop to render aid to someone stranded on a road; and he cannot use an automobile or travel without permission. These restraints far exceed normal criminal law probation or community supervision. The general deterrent effect critically observed by Justice Kennedy is patent. *Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring).

Hendricks observes the State may take measures to restrict the freedom of the dangerously mentally ill.[19] *Id.* Far removed from the realm of medical or psychiatric assistance, many disabilities of the Texas law exceed criminal probation or community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon 2000). While many of the restrictions on a person found to be a sexually violent predator are identical to Texas criminal community supervision law, some are even more invasive, as noted above. Notably, a judge may extend community supervision under the penal system for ten years. *Id.* One subject to the court's indeterminate supervision under the SVP law, is exposed to a new felony term from 25 years to lifetime confinement in the state penitentiary. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.085 (Vernon 2000). And the legislature unequivocally enunciated it seeks "long-term supervision and treatment." *Id.* § 841.001.

It is true the Texas law, unlike Kansas, does not at its initial implementation actually confine the person in a treatment center. However, the vast majority of effectively penal parole conditions, can hardly be said to be less restrictive or coercive than the conditions of a patient at a Texas mental institution. At most, such a person is restricted and confined for one year. *Id.* § 574.066. One-year hospital confinement without superimposed felony repercussions, is sensibly limited and accompanied by procedural safeguards. This contrasts with indeterminate long-term commitment, enforced by felony imprisonment, accompanied by penal parole conditions, and additional

[19] Texas makes no requirement that a person be dangerously mentally ill. The focus of the act is on behavior. We discuss Texas' absence of the necessary non-volitional finding below.

restrictions often exceeding those imposed by the criminal law. Indeed, the elaborate structure for release from supervision and treatment, contrary to conventional mental health commitments, only requires a biannual "review." *Id.* § 841.101. The State council contracts for an expert who reports to the judge. *Id.* The judge then conducts a review at which the person is not entitled to attend, though counsel may appear. Only if the judge determines there is probable cause that the person's behavioral abnormality *has changed,* is it possible for the person to have a hearing with certain limited constitutional protections. *Id.* § 841.103.[20] The certain effect of the law is to grant review only when the executive or judicial branch of Texas government grants leave. The initial and requisite burden of proof is effectively on the committed to show the change. The State need not show the further need for commitment. Justice Burgess, in his dissent in *Beasley,* would hold these review provisions of the SVP act unconstitutional for violation of the equal protections clause. *See Beasley,* 95 S.W.3d at 618 (Burgess, J., dissenting). We doubt the Texas act meets the constitutional qualifications of *Jones. Jones,* 463 U.S. at 368 (even a criminal acquittee may not be held longer unless the person is both mentally ill and dangerous).[21]

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[20] A case manager may also authorize the person to petition the court for release, thus by-passing judicial screening. HEALTH & SAFETY CODE ANN. § 841.121 (Vernon 2000). If the State's case manager does not authorize such a petition, the offender may file an unauthorized petition for release, subject to judicial scrutiny. *Id.* § 841.123. "The judge is not required to deny a petition [unauthorized] if probable cause exists to believe that the petitioner's behavioral abnormality has changed." *Id.* (Note the language emphasizing a judge is not "required" to deny an unauthorized petition.)

[21] This is precisely the holding in *Crane,* infra.

Therefore, unlike Kansas, persons committed under the Texas SVP are subject to conditions often more onerous than conventional civil commitment. *See Hendricks,* 521 U.S. at 363. As noted, the Texas indeterminate commitment is more onerous than many comparable penal provisions.

Justice Thomas, writing for the plurality, held that potentially indefinite duration is not evidence of punitive intent. *Hendricks,* 521 U.S. 346 at 363, 138 L. Ed. 2d 501. He stated: "If, at any time, the confined person is adjudged 'safe to be at large,' he is statutorily entitled to immediate release." *Id.* at 363-64. "If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement." *Id.* at 364. According to Justice Thomas, this requirement demonstrates that Kansas does not intend that the committed individual remain confined any longer than the period of time that the person suffers from mental abnormality. *Id.* Texas law is inapposite.

The Texas SVP law disavows its own mental health statute's one year commitment limitation, and reduces or eliminates significant other substantive and procedural safeguards. *Cf.* TEX. HEALTH & SAFETY CODE ANN. § 574.066 (Vernon 1992). Under the Texas conventional mental health statute, before a renewal of order for extended mental health services beyond one year can be entertained: (1) a county or district attorney or other adult must file an application to renew an order for extended mental health services; (2) the application must explain in detail why the person requests renewal; (3) the application to renew an order committing the patient to extended inpatient mental health services must also explain in

detail why a less restrictive setting is not appropriate; (4) the application must be accompanied by two certificates of medical examination for mental illness signed by physicians who examined the patient during the 30 days preceding the date on which the application is filed; (5) the patient, the patient's attorney, or other individual may request a hearing on the application or the court may set a hearing on its own motion; (6) a court may not renew an order unless the court finds that the patient meets the criteria for extended mental health services prescribed by Sections 574.035(a)(1), (2), and (3) and the court must make the findings prescribed by this subsection to renew an order, regardless of whether a hearing is requested or set; and (7) a renewed order authorizes treatment for not more than 12 months. *Id.*

The Texas SVP act fails the Kansas safeguards elucidated by Justice Thomas, to confine no longer than necessary. It ignores or vitiates its own laws providing for the mental health rights to retarded persons. A person thought to be mentally retarded has the right promptly to receive a determination of mental retardation using diagnostic techniques that are adapted to that person's cultural background, language, and ethnic origin to determine if the person is in need of mental retardation services. TEX. HEALTH & SAFETY CODE ANN. § 592.018 (Vernon 2000). This was denied Fisher, and presumably all who fall under the SVP act. Each person has the right to live in the least restrictive habilitation setting and to be treated and serve [sic] in the least intrusive manner appropriate to the client's individual needs. *Id.* § 592.032 ("Each client has the right to live in the least restrictive habilitation setting and to be treated and served in the least intrusive manner appropriate to

the client's individual needs."). Fisher's standard 100-plus disabilities are not tailored to his individual needs but rather represent a net cast to the broadest reach of possible variables. Thus, the Texas act fails to meet the *Kennedy* test of whether the act is excessive in relation to the alternative purpose assignable to it. *Kennedy*, 372 U.S. at 169. Unlike a conventional mental commitment not to exceed one year, the SVP trial evidence need not include either (1) expert testimony or (2) evidence of a recent overt act or a (3) continuing pattern of behavior that tends to confirm the illness. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.035 (Vernon 2000). We hasten to add that although not required, the State did produce expert testimony in this particular case.[22]

There is little doubt that like Kansas, Texas assigned a non-punitive, alternative purpose, to its act. *See Hendricks*, 521 U.S. at 361, 138 L. Ed. 2d 501. The Legislature found that a small extremely dangerous group of sexually violent predators exists, that conventional treatment does not work and is inadequate to address the risk of "repeated predatory behavior that sexually violent predators pose to society." TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2000). The critical issue persists, however, whether objective manifestations of purpose indicate conclusively that the provisions in question can only be interpreted as punitive. *Kennedy*, 372 U.S. at 168.

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[22] One expert testified about the results of the Static 99 and Mn SOST-R tests. In essence, both tests heavily weigh past sexual violations, and from the past acts, future acts are hypothesized. The evidence heard by the jury thus encompasses the past convictions, and testing based on the same acts to purportedly prove behavioral abnormality and future likelihood (not probability) of recidivism.

Fisher complains he is not offered the opportunity for appropriate treatment. This plea seems to be denied by *Hendricks*: "We have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." *Hendricks*, 521 U.S. at 366. "Similarly, it would be of little value to require treatment as a precondition for civil commitment of the dangerously insane when no acceptable treatment existed." *Id.* Alternatively, the Court held, the possibility that an ancillary purpose of the act was to provide treatment, and no treatment is provided, does not require a conclusion the act is punitive. *Id.* at 367. If treatment is as irrelevant as described, should not the law require a "lack of control" element and finding? *Crane* answers the question in the affirmative.

IV

After Hendricks: Crane

After *Hendricks*, the United States Supreme Court markedly curtailed the application of this prior holding which we analyzed at length above. The Constitution does not permit "commitment of the type of dangerous sexual offender considered in *Hendricks* without any lack-of-control determination." *Crane*, 534 U.S. at 412. Sexual offenders subject to civil commitments must be distinguished from other dangerous persons more properly dealt with in the criminal proceedings. *Id.* "That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence.'" *Id.* (citing *Hendricks*,

521 U.S. at 360 (Kennedy, J., concurring)).[23] Hendricks was a pedophile who admitted lack of volitional control, coupled with a prediction of future dangerousness. *Id.* Hendricks, whose condition was listed in DSM-IV 571-572, stated he could not control the urge to molest children. *Id.* at 414 (Scalia, J., dissenting). In Justice Scalia's dissent, (joined by *Hendricks* author Justice Thomas), he notes the Kansas act, (like Texas's), contains no requirement of inability to control. *Id.* at 419. He also clearly notes the majority now establishes the requirement of a separate finding of inability to control behavior. *Id.*

We can only conclude that *Crane* amplifies the *Kennedy* factors and modifies *Hendricks*. In addition to dangerousness, the requisite mental element is inability to control behavior. *Id.* at 412. This is a required finding by the fact finder. *Id.*[24] There is no requirement of total or complete lack of control. *Id.* at 411. Hendricks demonstrated lack of control because of his serious sexual mental disorder – pedophilia – thus providing proof of inability to control behavior. *Id.* at 413. Hendricks himself testified he could not "control the urge" to molest children. *Id.* at 414.

Because neither party briefed the application of *Crane*, we do not consider whether the absence of a finding

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[23] It should be noted that Justice Kennedy, by concurring, provided the slim majority in the *Hendricks* plurality opinion. Justice Breyer authored the dissent in *Hendricks* and wrote for the seven-to-two majority in *Crane*.

[24] In a Memorandum opinion, the Beaumont Court of Appeals sought to apply *Crane* in a factual sufficiency context. *See In Re Commitment of Corliss*, No. 09-02-294-CV, 2003 Tex. App. LEXIS 1633, at *3-5 (Tex. App. – Beaumont 2003, *pet. filed*) (memorandum opinion).

of inability to control behavior is fundamental error.[25] Rather, we apply the rationale of *Crane* as one more objective manifestation in determining whether the statute is punitive facially or as applied to Fisher. Because the Legislature has not narrowly crafted the sexually violent predator statute with the necessary "inability to control" requirement, the act is more likely designed as a mechanism for retribution or general deterrence.

V

We note our disagreement with the plurality opinion of our sister court. The Beaumont Court of Appeals was handed the herculean task of deciding whether to enjoin the application of the SVP act. *Beasley v. Molett*, 95 S.W.3d 590 (Tex. App. – Beaumont, 2002, *no pet. h.*). It was faced with fourteen points of first impression.[26] We only address

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[25] The jury below was asked whether Fisher suffered from a behavior abnormality that makes him likely to engage in predatory sexual violence. "Behavior abnormality" was defined as "a congenital or acquired condition that by affecting a person's emotional or volitional capacity predisposes the person to commit a sexually violent offence to the extent that the person becomes a menace to the health and safety of another person." We cannot discern that this question or the evidence of two 1987 sexual assault convictions equate to a mental disorder that impairs Fisher's volitional control to the degree he cannot control his dangerous *sexual behavior*. Though his schizophrenia could relate to conventional civil commitments, we do not perceive an acceptable scientific or empirical basis to equate Fisher's true unrelated mental illness with a condition that predisposes him to violent sexual offenses to the extent he cannot control his dangerous sexual behavior.

[26] The second member of the majority, Chief Justice Walker, retired from the court at the end of 2002, after a long and distinguished career.

our disagreement with that portion of their opinion dealing with the nature of the proceeding. *Id.* at 607-08.[27]

We agree that the act imposes certain restraints similar to those imposed in community supervision (parole). *Id.* We agree that "the acts that lead the person to initially qualify for the status of 'sexually violent predator' are crimes." *Id.* at 607. But we differ on the court's conclusion that there is no retribution because there is no culpability for prior criminal conduct and that the statutory scheme of treatment and supervision for the purpose of avoiding the menace of such persons is not excessive. *See id.* We believe the myriad affirmative disabilities and restraints placed on Fisher, restrictions against all touching, even his children, avoiding all venues with women or children, family criminal background checks, multiple polygraphs, satellite monitoring, and criminal felony penalties are excessive and go well beyond restraints necessary to protect the public. We have also outlined how such disabilities under the Texas act have historically been treated as punitive and how criminal scienter is required. Without further reiteration, we believe our detailed analysis readily supports our respectful disagreement with our sister court.

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[27] We specifically do not comment upon or address any of the other and sometimes interrelated issues of their opinion. Suffice it to say, our fundamental disagreement on the nature of the proceedings would affect other constitutional concerns. Our sister court also briefly addressed the "nature of the proceedings" in *In re Commitment of Mullens*, 92 S.W.3d 881, 883 (Tex. App. – Beaumont 2002, *no pet. h.*) and *In re Commitment of Morales*, 98 S.W.3d 288, 290 (Tex. App. – Beaumont 2003, *no pet. h.*). Neither of these cases address the competency issue and both follow the rationale of *Beasley*. We trust this respectful disagreement should be and will be addressed by higher authorities.

That court has more recently partially addressed some of the specific issues we discuss. *See In re Commitment of Martinez*, 98 S.W.3d 373 (Tex. App. – Beaumont 2003, *no pet. h.*). The case is readily distinguishable because all three experts testified Martinez was competent to stand trial. *Id.* at 375-76. By dicta, the court held, relying on *Hendricks* and its own holding in *Beasley*, that no competency hearing was required. *Id.* The court also held Martinez's claim that he could not comply with the commitment order was not ripe. *Id.* (relying upon *Patterson*, 971 S.W.2d at 443). Because evidence shows Fisher to be both mentally retarded and mentally incompetent, we do not believe *Martinez* is controlling.

VI

Finally, we believe it helpful to further factually distinguish the *Hendricks* case from Fisher's. Fisher was convicted of two sexual assault crimes in February and August of 1987. Both convictions were based upon pleas of guilty. Fisher has served all of his time, which was extended because his probation was revoked three times for non-sexual matters – including the removal of his monitor. The two prior sexual violations were with adult women, possibly involving payment for prostitution. According to Fisher, he disagreed with the women about money. There was no proof of other sexual crimes although there was an alleged verbal threat toward a mental hospital nurse at Rusk State Hospital. There is no diagnosis of pedophilia or other recognized sexually related mental disorder. There was no allegation of involvement with children, yet Fisher was given the same restrictions as a practicing pedophile such as Hendricks. Hendricks was convicted of taking 'indecent liberties' with two 13-year-old boys. Hendricks

had a "chilling history" or repeated child sexual molestation including a 7-year-old girl, two young boys while working at the carnival, performing oral sex on an 8-year-old girl, and fondling an 11-year-old boy. *Hendricks*, 521 U.S. at 354. His conduct and multiple convictions spanned the years 1955 through his release in 1994. *Id.* at 354-55. He admitted his pedophilia, that he was not cured after professional help, and that he could not control his sexual urges toward children. *Id.* at 355. Most importantly, *Hendricks* demonstrates the type of mental illness constitutionally necessary to impose the liberty encroachments and restrictions under a sexually violent predatory law. As a practicing pedophile, Hendricks arguably had the component lack of control sexual mental abnormality to justify commitment. *See Crane*, 534 U.S. at 412. Schizophrenia and Fisher's two remote 1987 sexual assaults, do not demonstrate the component lack of sexual control that would justify the imposition of 100-plus civil and penal restrictions of the Texas law.

We also note nine additional punitive aspects of the Texas law contrasted with the substantially greater constitutional safeguards of the Kansas statute or as observed in *Hendricks*. We list these other objective manifestations. (1) In addition to Kansas procedural safeguards allowing a confined person's immediate release at any time the person is adjudged safe to be at large, Kansas also affords (2) "all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent." KAN. STAT. ANN. § 59-29a07 (1994). (3) Texas assigns a majority of the charging board (Multidisciplinary Team) from criminal law enforcement. The team includes two from mental health but is numerically controlled by three persons from the Texas

Department of Criminal Justice, (4) one of whom must be from the victim services office of that department; TEX. HEALTH & SAFETY CODE ANN. § 841.022 (Vemon [sic] 2000). (5) A "prosecutor" is selected from a special division of the prison prosecution unit, separate from the part of the unit responsible for prosecuting criminal cases. *Id.* § 841.004 (Prison Prosecution Unit). (6) No overt threat or act from the recent past is required. (7) No substantial threat or imminent risk is required. *Cf. Broussard. v. State,* 827 S.W.2d 619, 622 (Tex. App. – Corpus Christi 1992, *no writ*). (8) No notice is given to a prisoner or mental health patient that he or it is being evaluated for subjugation to the SVP act. (Nor is counsel provided at this juncture.) (9) The Multidisciplinary team's screening and assignment of charges to prosecutors are now secret meetings not subject to the Texas Open Meetings Act. *See* TEX. GOV. CODE § 551.002 (Vernon 1994); *Beasley,* 95 S.W.3d at 599.

Finally, we note precedent very similar to Fisher's case. *Jackson* dealt with a mentally defective deaf mute with a mental level of a pre-school child. *Jackson* 406 U.S. at 717. There the state, not unlike Texas, did not afford Jackson a substantial opportunity for early release. *Id.* at 729. Our highest court observed that Jackson was subjected to a more lenient *commitment* standard and to a more stringent standard of *release* than those generally applicable to all others not charged with offenses. In effect, to permanently institutionalize without showing either the requirements for commitment or the opportunity for release afforded by conventional commitment, Indiana deprived the petitioner of equal protection of the laws under the Fourteenth Amendment. *Id.* at 729-30. In other words, Jackson was entitled to the protections of conventional commitment

protection under circumstances similar to Fisher's. Because Fisher's commitment was as an outpatient, we also note there is no distinction in application of due process protection depending on whether the commitment is inpatient or outpatient. *In re D.F.R.*, 945 S.W.2d 210, 214-15 (Tex. App. – San Antonio 1997, *no. pet.*)

We sustain Fisher's first two issues regarding competency.[28] We conclude that the Texas SVP statute is manifestly punitive, both facially and as applied. Accordingly, Fisher is entitled to rights under the criminal law, specifically including the opportunity to effectively exercise his right to counsel, the right to be competent at trial, and understand and assist in the trial proceedings. Additionally, substantive due process requires he be mentally competent to comply with the order of commitment. He has the substantive right not to proceed to trial when he was incompetent. Even if the SVP statute were to be found civil or quasi-criminal, Fisher is minimally entitled to enjoy the statutorily specified opportunity to competently exercise his right to counsel. Nor do we see any overriding need of society that would refuse Fisher's right to be found sane before his proceedings.

The loss of liberty produced by involuntary commitment is more than a loss of freedom from confinement. *Vitek*, 445 U.S. at 492. Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed. *Jones*, 463 U.S., at 368; *Jackson*, 406 U.S. at 738. We must distinguish between sexual offenders subject to civil commitments and

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[28] Because of our disposition of Fisher's first two issues, we need not address his remaining issues. TEX. R. APP. P. 47.1

other dangerous persons more properly dealt with in criminal proceedings lest "civil commitments" become a "mechanism for retribution or general deterrence." *Crane* 534 U.S. at 412. Because we hold that Fisher was denied substantive and procedural due process, we reverse and remand for further proceedings consistent with this opinion.

DON WITTIG

Retired Justice

Justice Castillo Dissenting.

DISSENT BY: ERRLINDA CASTILLO

DISSENT:

DISSENTING OPINION

Before the Court En Banc

Dissenting Opinion by Justice Castillo

Assuming without deciding that appellant presented his specific constitutional challenges to the trial court and thus preserved error, I respectfully dissent for the reasons stated by the Austin court of appeals in *In re Browning*, 113 S.W.3d 851, 858-59 (Tex. App. – Austin 2003, *no pet. h.*) and the Beaumont court of appeals in *In re Martinez*, 98 S.W.3d 373, 375-76 (Tex. App. – Beaumont 2003, *no pet.*) (per curiam) and *Beasley v. Molett*, 95 S.W.3d 590, 607-08 (Tex. App. – Beaumont 2002, *pet. filed*).

ERRLINDA CASTILLO

Justice

Dissenting Opinion delivered and filed this the 18th day of December, 2003.

CAUSE NO. 00-10-06622-CV

IN RE: THE COMMITMENT OF	§	IN THE DISTRICT COURT OF
	§	MONTGOMERY COUNTY, TEXAS
	§	
MICHAEL FISHER	§	284TH JUDICIAL DISTRICT

FINAL JUDGMENT AND ORDER OF COMMITMENT

BE IT REMEMBERED that this cause came to trial on May 29, 2001. A jury was duly selected, sworn and seated. The jury returned the verdict reflected in Exhibit "A", attached hereto. The court made certain Findings of Fact and Conclusions of Law attached hereto as Exhibit "B." Based thereon it is:

It is accordingly ORDERED, ADJUDGED and DECREED that Michael Fisher be committed to treatment and supervision by the Council on Sex Offender Treatment and/or its contractors.

It is further ORDERED, ADJUDGED and DECREED that:

1. Michael Fisher live at a residence as approved by his case manager as long as it is not within a child safety zone which is defined by the following language in the Texas Code of Criminal Procedure, Section 13B, Article 42.12, as follows:

   (A) Michael Fisher shall not supervise or participate in any program that includes as participants or recipients persons who are 17 years of age or younger and that regularly provides athletic, civic, or cultural activities; and,

   (B) Michael Fisher shall not go in, on, or within 1000 feet of a premises where children commonly

gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility.

2. Michael Fisher shall follow the directives of his case manager in matters related to his residence selection and rules. Michael Fisher shall be provided with the name, work address, and telephone numbers of his case worker and treatment provider within twenty-four (24) hours of this Order.

3. Upon release from a lock-down facility, Michael Fisher shall be fitted with satellite monitoring equipment by the Department of Public Safety. Michael Fisher shall comply with all requirements of the Department of Public Safety to insure proper functioning of the monitoring equipment.

4. Michael Fisher shall comply with all terms and conditions of this court, his treatment provider and case manager and enter into a written agreement with his treatment provider and case manager specifying all of the terms and conditions of his treatment and case management including as are attached in Civil Commitment Requirements: Treatment and Supervision Contract (Exhibit "C").

5. If Michael Fisher has not previously given a blood or hair sample, he shall provide appropriate blood and hair samples to allow his inclusion in the DNA Data Bank maintained by the State of Texas.

6. Michael Fisher shall reside in the State of Texas.

7. Michael Fisher is prohibited from contacting the victims of the crimes for which he has previously been adjudicated in Cause Nos. 482193 and 461676, in the 228th District Court of Harris County, Texas whose names are Carolyn Brooks and Pamela Post-Oak (also known as Houston).

8. Michael Fisher shall not consume alcohol or controlled substances.

9. Michael Fisher shall not change his residence without prior authorization from the court with jurisdiction and venue.

10. Michael Fisher shall not leave the State of Texas without authorization from the court with jurisdiction and venue.

11. Michael Fisher shall notify his case manager within 48 hours of any change in his status that affects proper treatment and supervision, including change in the persons' physical health or job status and including any incarceration of the person.

12. This Final Judgment shall remain binding upon Michael Fisher following any release from any subsequent incarceration.

13. That Michael Fisher shall not be charged any of the cost of his treatment program or case management.

All costs are charged to the State of Texas. All relief not granted herein is DENIED.

It is further ORDERED that this cause be transferred to venue in Harris County, Texas as required by the Health and Safety Code, § 841.082(c).

SIGNED this 12th day of June, 2001.

/s/ P.K. Reiter
JUDGE PRESIDING
THE HONORABLE
P.K. REITER, JUDGE

EXHIBIT "A"

CAUSE NO. 00-10-06622-CV

IN RE: THE COMMITMENT OF	§	IN THE DISTRICT COURT OF
	§	MONTGOMERY COUNTY, TEXAS
	§	
MICHAEL FISHER	§	284TH DISTRICT COURT

JURY CHARGE

(Filed May 31, 2001)

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given in their testimony; but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice, or sympathy play any part in your deliberations.

2. In arriving at your answer, consider only the evidence introduced here under oath and such exhibits as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide whom you think should win, and then try to answer the question accordingly. Simply answer the question, and do not discuss nor concern yourselves with the effect of your answer.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. Your verdict must be unanimous. That means that all twelve of the jurors must agree upon the answer made and to the entire verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time would have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not do so again.

When the words are used in this charge in a sense that varies from the meaning commonly understood, you

are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to the question unless otherwise instructed. A "Yes" answer must be based on a belief beyond a reasonable doubt. If you do not find beyond a reasonable doubt that the evidence supports a "Yes" answer, then answer "No." The verdict must be reached by a unanimous agreement.

DEFINITIONS AND INSTRUCTIONS

"CIRCUMSTANTIAL EVIDENCE," a fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

"BEHAVIORAL ABNORMALITY," means a congenital or acquired condition that, by affecting a persons' emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.

"PREDATORY ACT," means an act that is committed for the purpose of victimization and that is directed toward:

(A) a stranger;

(B) a person of casual acquaintance with whom no substantial relationship exists; or

(C) a person with whom a relationship has been established or promoted for the purpose of victimization.

QUESTION ONE

Do you find that Michael Fisher suffers from a behavior abnormality that makes him likely to engage in a predatory act of sexual violence?

YES Yes

NO ___

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is have this complete charge read aloud and then you will deliberate upon your answer to the question asked.

It is the duty of the presiding juror –

1. to preside during your deliberations,
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4. to vote on the question,
5. to write your answer to the question in the space provided, and
6. to certify to your verdict in the space provided for the presiding juror's signature.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered the question you are required to answer under the instructions of the judge and your presiding juror has placed your answer in the space provided and signed the verdict as presiding juror, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/ P.K. Reiter
JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing question as herein indicated, and herewith return the same in to court as our verdict.

/s/ Sylvia Sheffield
PRESIDING JUROR

EXHIBIT "B"

CAUSE NO. 00-10-06622-CV

IN RE: THE COMMITMENT OF	§	IN THE DISTRICT COURT OF
	§	MONTGOMERY COUNTY, TEXAS
	§	
MICHAEL FISHER	§	284TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BE IT REMEMBERED that this cause came to trial on May 29, 2001. A jury was duly selected, sworn and seated. The jury returned the verdict reflected in Exhibit "A", attached hereto. The court makes the following:

Findings of Fact

1. Michael Fisher has been convicted of two sexually violent offenses, as that term is defined in HSC 841.002.

2. Michael Fisher currently suffers from a behavioral abnormality, as those terms are defined in HSC 841.002, which make [sic] him likely to engage in predatory acts of sexual violence.

3. The unanimous jury found beyond a reasonable doubt that Michael Fisher is a sexually violent predator, as that term is defined in HSC 841.003.

4. Michael Fisher was present in court at all times, effectively represented by counsel, and has had ample opportunity to review all petitions and court records on file in this cause. Based upon the foregoing, the court reaches the following:

Conclusions of Law

A. This court has jurisdiction over the subject matter of this cause, as well as personal jurisdiction over Michael Fisher.

B. Michael Fisher is a Sexually Violent Predator as that term is defined under HSC 841.003.

SIGNED this 12th day of JUNE, 2001.

/s/ P.K. Reiter
P.K. Reiter, Judge Presiding

EXHIBIT "C"

Civil Commitment Requirements:

Treatment and Supervision Contract

When you participate in the Outpatient Sexually Violent Predator Treatment Program (OSVPTP), you must follow all rules of the program. Failure to comply with these rules may result in legal action. Therefore, you must carefully read this Treatment and Supervision Contract. The treatment staff or case manager can help you read and understand the contract if you want them to do so. When you sign this contract, you are showing that you have read and understand it.

Contact with Victims

1. I will not have contact with my victim. I will not talk to my victim. I will not telephone or write notes to my victim. I will not send messages to my victim through other people. I will not send gifts to my victim. I will not send threats or convey threats to my victim. I will not make requests of my victim.

2. If my victim attempts to contact me, directly or indirectly, I will terminate contact and report the attempted contact in writing to the Case Manager and Treatment Staff.

3. I will not pass by the place where my victim lives, plays, works or goes to school. I will not go to the homes or residences of the victim's family or friends.

4. Any contact with my victim will be arranged and approved by the Case Manager and the Treatment Staff.

Contact with Children

5. I will not have direct or indirect contact with children unless supervised by the Case Manager and Treatment Staff or a chaperon who is approved by the Case Manager and the Treatment Staff.

6. If I am in an area where children are, I will leave the area. A child is any person younger then eighteen years old.

Contact with Potential Victims

7. I will not have direct or indirect contact with potential victims. If I am in an area where potential victims are, I will leave the area. Any contact with potential victims will be done under the supervision of an approved chaperon or the Case Manager and Treatment Staff. A potential victim includes but is not limited to persons similar to persons whom I have already sexually exploited. The Case Manager and Treatment Staff will inform me who constitutes potential victims. I agree to use the definition of potential

victim as designated by the Case Manager and Treatment Staff.

Potential Victim (specify):

Potential Victim (specify):

Potential Victim (specify):

Potential Victim (specify):

8. I will not have contact with or harass sexual assault treatment program contractors, staff, volunteers, or clients.

Contact with Family Members

9. I will not have any contact with family members unless approved by the Case Manager and Treatment Staff. EXCEPTIONS:

Initial Date

Initial Date

Initial Date

10. I understand that family members may be required to submit to a criminal background check before I can have contact with them.

11. I agree to allow and encourage family members to attend trainings conducted by The Case Manager or Treatment Staff.

12. I agree to sign a release permitting unfettered, two-way communication between family members and the Case Manager, family members and the Treatment Staff

and family members and other professionals involved in my treatment.

13. I understand that I may not be allowed to have contact with family members, or contact with family members may be suspended, unless the family members have completed counseling required by the Case Manager or Treatment Staff.

Control of Deviant Behavior

14. I will not buy, create, or possess pornography. I will not watch pornographic videos, TV programs or movies.

15. I will not watch R-rated movies or TV programs unless I discuss it with the Case Manager and Treatment Staff and receive prior written approval from both parties.

16. I will not display in my room or residence nude pictures or pictures of people who are partially clad, for example, wearing swim suits, underwear or tight and revealing clothes.

17. I will not cruise for victims. That is, I will not walk or ride around aimlessly, nor will I sit and watch people.

18. I will not go to schools, parks, swimming pools, movie theaters, public libraries, amusement parks, arcades or malls where children or potential victims are likely to be. I will not obtain work that requires contact with children or potential victims.

19. I will not use prostitutes. I will not travel through or go to places where prostitutes are located.

20. I will not make obscene telephone calls. I will not make telephone calls just to listen.

21. I will not touch people without their permission. I will not tickle or horseplay. I will not bump into people in an attempt to touch them for sexual gratification.

22. I will not engage in voyeurism of adults or children, for example. I will not look down the blouses of women or children.

23. I will not use the Internet or computers to gain access to sexual material or sexual partners. I will allow my Case Manager or his/her designee to inspect my computer including all hardware and software. I will allow my Case Manager or his/her designee to take my computer to have it assessed by computer experts to determine if I have used my computer for sexual purposes.

24. I will not engage in exhibitionism.

Control of Sexual Behavior

25. I will not use nonsexual objects during sexual acts, for example, shoes or belts.

26. I will not use fetishism.

27. I will not masturbate to deviant fantasies, especially to fantasies of victims or potential victims. I will stop deviant fantasies when they occur.

28. I will not use animals during sexual acts.

29. I will not use 1-900 sex numbers or any form of telephone sex.

30. I will not have sexual contact with anyone who is under the age of legal consent.

31. I will not force any person to have sex with me.

32. I will not buy, possess or use sadomasochistic bindings, restraints or other paraphernalia.

33. I will not trick or bribe a person to have sex with me. I will not make a person feel guilty so that he/she will have sex with me.

34. I will not have sex with a person who is intoxicated or has been using drugs or alcohol.

35. I will not engage in casual sex, that is, sex with persons with whom I am not in a committed, monogamous relationship.

36. I will not engage in anonymous sex, that is, sex with persons I do not know and am not in a relationship with.

37. I will not have sexual contact with a person without first telling him or her that I am a Sexually Violent Predator. Before I have sexual contact with that person, I will sign a release permitting unfettered, two-way communication between the Case Manager and Treatment Staff and my potential sexual partner. I understand that the Case Manager and Treatment Staff must meet with my potential sexual partner before I have sex with that person.

Control of High Risk Behavior

38. I will not drink alcohol or use illicit drugs.

39. I will not work in or go to bars, clubs or other places where the sale of alcohol is the primary source of business.

40. I agree to submit to random drug and alcohol screens.

41. I will not commit any new crimes.

42. I will abide by any dress code established for me by the Case Manager or Treatment Staff.

43. I will not engage in aggression or violence towards myself or others.

44. I will not join sex clubs.

45. I will not go to topless bars or adult bookstores.

46. I will not buy, borrow, steal, possess or use cameras, video recorders, audio recorders, CD recorders, DVD recorders or any other recording device.

47. I will not use ficitious [sic] names or aliases.

48. I will not use a Post Office box.

49. I will observe the schedule developed for me by the Interagency Case Management Team.

50. I will not associate with persons on probation or parole or known felons, especially other sex offenders.

51. I will not buy or possess children's or cross gender clothing.

52. I will not buy or possess costumes or masks.

53. I will not buy, possess or wear law enforcement identifications, insignias, badges, uniforms or other items associated with law enforcement.

54. I will not buy possess or wear military uniforms, identifications, insignias or other items associated with the military.

55. If and when I am allowed to operate a motor vehicle. I will never pick up hitchhikers or stop to help persons stranded on the road.

Travel

56. I agree to follow the Case Manager's rules regarding travel.

57. I agree to have an approved Travel Plan before leaving the county. I understand that Travel Plans may take two weeks or more before approved by the Case Manager and Treatment Staff.

58. I agree to have a High Risk Plan before going through a high impulse area. I understand that High Risk Plans may take as much as two weeks before the Case Manager and Treatment Staff approve them.

59. I will not own, operate or use a motor vehicle without prior approval from the Case Manager and Treatment Staff.

60. If I am permitted to operate a motor vehicle. I will maintain a driving log to include the following information each time the vehicle is used: mileage, time of departure and arrival, destination, route traveled and passengers.

61. I agree never to be in a motor vehicle with a child or potential victim.

Supervision Guidelines

62. I agree to attend all scheduled appointments with my Case Manager or his or her designee. Scheduled appointments include office visits as well as field visits.

63. I agree to be on time for all appointments with my Case Manager or his or her designee.

64. I agree to comply with the Treatment and Supervision Contract.

65. I agree to comply with any requests or directives made by the Case Manager.

66. I agree to attain and maintain full-time employment as approved by the Interagency Case Management Team.

67. I agree to allow the Case Manager to make face-to-face contact with me at home, work or other places outside the Case Manager's office.

68. I agree to provide the Case Manager with any and all information requested regarding my family, friends, employer, and recreational and other contacts.

69. I agree to allow the Case Manager to have contact with any and all of my family, friends, coworkers, acquaintances and other persons whom I might have had or possibly could have incidental contact with.

70. I agree to actively participate in and successfully complete any and all counseling programs or sessions as directed by the Case Manager.

Tracking Services

71. I agree to wear an electronic monitor as directed by the Case Manager.

72. I agree to follow all requirements of the tracking services as established by the Case Manager and other professionals involved in providing tracking services.

73. I agree not to tamper with, alter, modify or manipulate any electronic monitor or associated equipment used to monitor me.

Therapy Guidelines

74. I will be on time for all scheduled appointments. The Treatment Staffs act as the timekeepers.

75. I will attend all scheduled sessions. Treatment Staffs will document and report whether or not I attend a scheduled session.

76. I agree to actively participate in and successfully complete the OSVPTP. Active participation includes talking constructively during therapy sessions and completing assignments. The Treatment Provider will determine if I am actively participating in treatment.

77. I will comply with the Group Rules, Program Rules, Treatment and Supervision Contract, and the Treatment Plan. I will comply with any individual rules Treatment Staffs develop for me. I understand that any violation of any of these rules will result in one or more of the following: an Incident Report, a meeting with the Case Manager, suspension from therapy or termination from the OSVPTP. Treatment Staffs may use any of these responses as they see fit.

78. I will be asked to take several polygraph tests, or lie detector tests. I agree to take and pass the polygraph test when I am asked to do so. I agree to use a polygrapher recommended or approved by the Treatment Staff. I agree to attend the polygraph session only after Treatment Staffs have submitted questions to the polygrapher. I understand I may have to continue to take the polygraph test until I pass it to the satisfaction of the Treatment Staff.

79. I understand that an Incident Report will be written when I engage in any behavior that violates the Treatment

Contract and Supervision Contract or Individual Rules or when I engage in behavior that the Treatment Staff deems dangerous, aggressive, threatening, risky, irresponsible or troubling.

80. I understand that if I fail to make progress, I may be terminated from the program. The Treatment Staff determines whether or not I am making progress.

81. I understand I must report any violations of the Treatment and Supervision Contract at the time of my layout in a group therapy session. I understand I must discuss and correct violations.

82. I understand that I must have a written assignment ready to present to every group therapy session. I understand that partially completed work is not acceptable. I understand that I must be working on revisions of worksheets or new versions of worksheets at all times. I understand I must be prepared to present at least twenty minutes of worksheet material from my Client Handbook at every group therapy session. When not presenting my own assignments, I agree to actively listen and actively give feedback to group members who do present topics.

83. I agree to attend individual sessions as required. I understand that if I fail to schedule or attend individual sessions as required, I am in violation of the Treatment and Supervision Contract.

84. I agree to attend other types of therapy, such as Anger Management, if the Treatment Staff determines that it might help me reach my goal of **No More Victims**.

85. I understand Treatment Staffs do not provide counseling over the telephone or crisis or emergency counseling. I agree to contact providers pre-approved by the

Interagency Case Management Team if I have a mental health emergency.

86. If I am seeing another counselor or mental health professional at the time of intake, or if I begin to see such a professional while in this OSVPTP, I will sign a release allowing Treatment Staffs to communicate with my counselor or mental health professional. If requested by the Treatment Staff or the Case Manager, I will cease attending therapy or receiving treatment from the other counselor or mental health professional and go to a counselor or mental health professional recommended by the Case Manager or Treatment Staff.

87. I understand the only excused absences from scheduled therapy appointments are a court appointment at the exact time of the scheduled appointment and illness. If I am ill, I understand that it means I am ill for the day. I understand that it means I don't go to work or recreational activities that day. Furthermore, I agree to go to a physician the day of my illness. I will bring a physician's note excusing me from therapy to the following session, for example, if I miss a group session, I will bring a physician's note to the next group session. I agree to call my individual therapist before the time of my appointment if I am going to miss an individual session. I agree to call both of my group therapists before to the time of the group session, if I am going to miss a group session. I will always call my Case Manager before to missing any sessions.

88. I understand that if I am discharged from group, am arrested or abscond, group therapists will discuss my absence or departure with group members so they can continue therapy.

Absence of Confidentiality

89. I understand that there are no secrets among the Case Manager, Treatment Staff, and other professionals who are involved in my supervision or treatment. What I tell one professional will be shared with all professionals and all agencies involved in my supervision, treatment, and outpatient civil commitment.

90. I understand that the Case Manager, Treatment Staff and other professionals must talk about me. I understand that these professionals will be in scheduled or unscheduled contact with each other and the courts. I understand that these professionals' communication may include but is not limited to communicating by e-mail, Internet, telephone, fax, letters, progress reports and incident reports as a means of communication.

91. I understand that the Case Manager, Treatment Staff and other professionals can talk to law enforcement professionals, medical professionals and other relevant people about me if I try to hurt myself or someone else.

92. I understand that the Case Manager, Treatment Staff and everyone who knows me must report victims of child abuse to the state.

93. I know that visitors may come to the OSVPTP. Some visitors may observe therapy sessions. I agree to allow the Case Manager and Treatment Staff to exercise their judgment to determine who is allowed to be a visitor.

94. I understand that I am not permitted to reveal the identity of any person in the program to my family, friends or contacts.

95. I will not have contact with group members other than in therapeutic or supervision sessions conducted by the Case Manager or Treatment Staff.

96. I understand information about me is kept in a database for the purpose of outcoming evaluation studies. I understand all information about me is kept confidential and if the results of evaluation studies are released, there will be no identifying information and my identity will not be revealed.

97. I understand that my therapy or supervision sessions may be video or audio taped. I agree to allow the Case Manager or Treatment Staff to video or audio record my therapy or training sessions.

If I have any questions about the contract, I know that I can ask the Case Manager or Treatment Provider. When I sign the contract, it means that I understand and agree to it. A photocopy of the contract is as valid as the original.

Client's Signature Date

Treatment Provider Date

Case Manager Date

*The treatment staff will forward a copy of this contract to the case manager. The original will be retained by the treatment staff.

Health & Safety Code

CHAPTER 841. CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

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HEALTH & SAFETY CODE

TITLE 11. CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

CHAPTER 841. CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

SUBCHAPTER A. GENERAL PROVISIONS

§ 841.001. LEGISLATIVE FINDINGS. The legislature finds that a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence. The legislature finds that the existing involuntary commitment provisions of Subtitle C, Title 7, are inadequate to address the risk of repeated predatory behavior that sexually violent predators pose to society. The legislature further finds that treatment modalities for sexually violent predators are different from the traditional treatment modalities for persons appropriate for involuntary commitment under Subtitle C, Title 7. Thus, the legislature finds that a civil commitment procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.002. DEFINITIONS. In this chapter:

(1) "Attorney representing the state" means an attorney employed by the prison prosecution unit to initiate and pursue a civil commitment proceeding under this chapter.

(2) "Behavioral abnormality" means a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.

(3) "Case manager" means a person employed by or under contract with the council to perform duties related to outpatient treatment and supervision of a person committed under this chapter.

(4) "Council" means the Council on Sex Offender Treatment.

(5) "Predatory act" means an act that is committed for the purpose of victimization and that is directed toward:

(A) a stranger;

(B) a person of casual acquaintance with whom no substantial relationship exists; or

(C) a person with whom a relationship has been established or promoted for the purpose of victimization.

(6) "Repeat sexually violent offender" has the meaning assigned by Section 841.003.

(7) "Secure correctional facility" means a county jail or a confinement facility operated by or under contract with any division of the Texas Department of Criminal Justice.

(8) "Sexually violent offense" means:

(A) an offense under Section 21.11(a)(1), 22.011, or 22.021, Penal Code;

(B) an offense under Section 20.04(a)(4), Penal Code, if the defendant committed the offense with the intent to violate or abuse the victim sexually;

(C) an offense under Section 30.02, Penal Code, if the offense is punishable under Subsection (d) of that section and the defendant committed the offense with the intent to commit an offense listed in Paragraph (A) or (B);

(D) an attempt, conspiracy, or solicitation, as defined by Chapter 15, Penal Code, to commit an offense listed in Paragraph (A), (B), or (C);

(E) an offense under prior state law that contains elements substantially similar to the elements of an offense listed in Paragraph (A), (B), (C), or (D); or

(F) an offense under the law of another state, federal law, or the Uniform Code of Military Justice that contains elements substantially similar to the elements of an offense listed in Paragraph (A), (B), (C), or (D).

(9) "Sexually violent predator" has the meaning assigned by Section 841.003.

(10) "Tracking service" means an electronic monitoring service, global positioning satellite service, or

other appropriate technological service that is designed to track a person's location.

Added by Acts 1999, 76th Leg., ch. 1188, Sec. 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, Sec. 16, eff. Sept. 1, 2003.

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§ 841.003. SEXUALLY VIOLENT PREDATOR. (a) A person is a sexually violent predator for the purposes of this chapter if the person:

(1) is a repeat sexually violent offender; and

(2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.

(b) A person is a repeat sexually violent offender for the purposes of this chapter if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses or if:

(1) the person:

(A) is convicted of a sexually violent offense, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the person was subsequently discharged from community supervision;

(B) enters a plea of guilty or nolo contendere for a sexually violent offense in return for a grant of deferred adjudication;

(C) is adjudged not guilty by reason of insanity of a sexually violent offense; or

(D) is adjudicated by a juvenile court as having engaged in delinquent conduct constituting a sexually violent offense and is committed to the Texas Youth Commission under Section 54.04(d)(3) or (m), Family Code; and

(2) after the date on which under Subdivision (1) the person is convicted, receives a grant of deferred adjudication, is adjudged not guilty by reason of insanity, or is adjudicated by a juvenile court as having engaged in delinquent conduct, the person commits a sexually violent offense for which the person:

(A) is convicted, but only if the sentence for the offense is imposed; or

(B) is adjudged not guilty by reason of insanity.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.004. PRISON PROSECUTION UNIT. A special division of the prison prosecution unit, separate from that part of the unit responsible for prosecuting criminal cases, is responsible for initiating and pursuing a civil commitment proceeding under this chapter.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.005. OFFICE OF STATE COUNSEL FOR OFFENDERS. (a) Except as provided by Subsection (b), the Office of State Counsel for Offenders shall represent an indigent person subject to a civil commitment proceeding under this chapter.

(b) If for any reason the Office of State Counsel for Offenders is unable to represent an indigent person described by Subsection (a) at a civil commitment proceeding under this chapter, the court shall appoint other counsel to represent the indigent person.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 17, eff. Sept. 1, 2003.

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§ 841.006. APPLICATION OF CHAPTER. This chapter does not:

(1) prohibit a person committed under this chapter from filing at any time a petition for release under this chapter; or

(2) create for the committed person a cause of action against another person for failure to give notice within a period required by Subchapter B, C, or D.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 17, eff. Sept. 1, 2003.

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§ 841.007. DUTIES OF COUNCIL ON SEX OFFENDER TREATMENT. The Council on Sex Offender Treatment is responsible for providing appropriate and necessary treatment and supervision through the case management system.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 17, eff. Sept. 1, 2003.

SUBCHAPTER B. NOTICE OF POTENTIAL PREDATOR; INITIAL DETERMINATIONS

§ 841.021. NOTICE OF POTENTIAL PREDATOR. (a) Before the person's anticipated release date, the Texas Department of Criminal Justice shall give to the multidisciplinary team established under Section 841.022 written notice of the anticipated release of a person who:

(1) is serving a sentence for a sexually violent offense; and

(2) may be a repeat sexually violent offender.

(b) Before the person's anticipated discharge date, the Texas Department of Mental Health and Mental Retardation shall give to the multidisciplinary team established under Section 841.022 written notice of the anticipated discharge of a person who:

(1) is committed to the department after having been adjudged not guilty by reason of insanity of a sexually violent offense; and

(2) may be a repeat sexually violent offender.

(c) The Texas Department of Criminal Justice or the Texas Department of Mental Health and Mental Retardation, as appropriate, shall give the notice described by Subsection (a) or (b) not later than the first day of the 16th month before the person's anticipated release or discharge date, but under exigent circumstances may give the notice at any time before the anticipated release or discharge date. The notice must contain the following information:

(1) the person's name, identifying factors, anticipated residence after release or discharge, and criminal history;

(2) documentation of the person's institutional adjustment and actual treatment; and

(3) an assessment of the likelihood that the person will commit a sexually violent offense after release or discharge.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.022. MULTIDISCIPLINARY TEAM. (a) The executive director of the Texas Department of Criminal Justice and the commissioner of the Texas Department of Mental Health and Mental Retardation jointly shall establish a multidisciplinary team to review available records of a person referred to the team under Section 841.021. The team must include:

(1) two persons from the Texas Department of Mental Health and Mental Retardation;

(2) two persons from the Texas Department of Criminal Justice, one of whom must be from the victim services office of that department;

(3) one person from the Texas Department of Public Safety; and

(4) two persons from the council or council personnel.

(b) The multidisciplinary team may request the assistance of other persons in making an assessment under this section.

(c) Not later than the 60th day after the date the multidisciplinary team receives notice under Section 841.021(a) or (b), the team shall:

(1) assess whether the person is a repeat sexually violent offender and whether the person is likely to commit a sexually violent offense after release or discharge;

(2) give notice of that assessment to the Texas Department of Criminal Justice or the Texas Department of Mental Health and Mental Retardation, as appropriate; and

(3) recommend the assessment of the person for a behavioral abnormality, as appropriate.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 18, eff. Sept. 1, 2003.

§ 841.023. ASSESSMENT FOR BEHAVIORAL ABNORMALITY. (a) Not later than the 60th day after the date of a recommendation under Section 841.022(c), the Texas Department of Criminal Justice or the Texas Department of Mental Health and Mental Retardation, as appropriate, shall assess whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. To aid in the assessment, the department required to make the assessment shall use an expert to examine the person. That department may contract for the expert services required by this subsection. The expert shall make a clinical assessment based on testing for psychopathy, a clinical interview, and other appropriate assessments and techniques to aid the department in its assessment.

(b) If as a result of the assessment the Texas Department of Criminal Justice or the Texas Department of Mental Health and Mental Retardation believes that the person suffers from a behavioral abnormality, the department making the assessment shall give notice of that assessment and provide corresponding documentation to the attorney representing the state not later than the 60th day after the date of a recommendation under Section 841.022(c).

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 19, eff. Sept. 1, 2003.

SUBCHAPTER C.
PETITION ALLEGING PREDATOR STATUS

§ 841.041. PETITION ALLEGING PREDATOR STATUS. (a) If a person is referred to the attorney representing the state under Section 841.023, the attorney may file, in a Montgomery County district court other than a family district court, a petition alleging that the person is a sexually violent predator and stating facts sufficient to support the allegation.

(b) A petition described by Subsection (a) must be:

(1) filed not later than the 90th day after the date the person is referred to the attorney representing the state; and

(2) served on the person as soon as practicable after the date the petition is filed.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 20, eff. Sept. 1, 2003.

SUBCHAPTER D. TRIAL

§ 841.061. TRIAL. (a) Not later than the 270th day after the date a petition is served on the person under Section 841.041, the judge shall conduct a trial to determine whether the person is a sexually violent predator.

(b) The person or the state is entitled to a jury trial on demand. A demand for a jury trial must be filed in writing not later than the 10th day before the date the trial is scheduled to begin.

(c) The person and the state are each entitled to an immediate examination of the person by an expert. All components of the examination must be completed not later than the 90th day before the date the trial begins.

(d) Additional rights of the person at the trial include the following:

(1) the right to appear at the trial;

(2) except as provided by Subsection (f), the right to present evidence on the person's behalf;

(3) the right to cross-examine a witness who testifies against the person; and

(4) the right to view and copy all petitions and reports in the court file.

(e) The attorney representing the state may rely on the petition filed under Section 841.041 and supplement the petition with documentary evidence or live testimony.

(f) A person who is on trial to determine the person's status as a sexually violent predator is required to submit to all expert examinations that are required or permitted of the state to prepare for the person's trial. A person who fails to submit to expert examination on the state's behalf as required by this subsection is subject to the following consequences:

(1) the person's failure to participate may be used as evidence against the person at trial;

(2) the person may be prohibited from offering into evidence the results of an expert examination performed on the person's behalf; and

(3) the person may be subject to contempt proceedings if the person violates a court order by failing to submit to an expert examination on the state's behalf.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 21, eff. Sept. 1, 2003.

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§ 841.062. DETERMINATION OF PREDATOR STATUS. (a) The judge or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. Either the state or the person is entitled to appeal the determination.

(b) A jury determination that the person is a sexually violent predator must be by unanimous verdict.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.063. CONTINUANCE. The judge may continue a trial or hearing conducted under this chapter if the person is not substantially prejudiced by the continuance and:

(1) on the request of either party and a showing of good cause; or

(2) on the judge's own motion in the due administration of justice.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 22, eff. Sept. 1, 2003.

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§ 841.064. MISTRIAL. A trial following a mistrial must begin not later than the 90th day after the date a mistrial was declared in the previous trial, unless the later trial is continued as provided by Section 841.063.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

SUBCHAPTER E. CIVIL COMMITMENT

§ 841.081. CIVIL COMMITMENT OF PREDATOR. (a) If at a trial conducted under Subchapter D the judge or jury determines that the person is a sexually violent predator, the judge shall commit the person for outpatient treatment and supervision to be coordinated by the case manager. The commitment order is effective immediately on entry of the order, except that the outpatient treatment and supervision begins on the person's release from a secure correctional facility or discharge from a state hospital and continues until the person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence.

(b) At any time after entry of a commitment order under Subsection (a), the case manager may provide to the person instruction regarding the requirements associated with the order, regardless of whether the person is incarcerated at the time of the instruction.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 23, eff. Sept. 1, 2003.

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§ 841.082. COMMITMENT REQUIREMENTS. (a) Before entering an order directing a person's outpatient civil commitment, the judge shall impose on the person requirements necessary to ensure the person's compliance with treatment and supervision and to protect the community. The requirements shall include:

(1) requiring the person to reside in a particular location;

(2) prohibiting the person's contact with a victim or potential victim of the person;

(3) prohibiting the person's possession or use of alcohol, inhalants, or a controlled substance;

(4) requiring the person's participation in and compliance with a specific course of treatment;

(5) requiring the person to:

(A) submit to tracking under a particular type of tracking service and to any other appropriate supervision; and

(B) refrain from tampering with, altering, modifying, obstructing, or manipulating the tracking equipment;

(6) prohibiting the person from changing the person's residence without prior authorization from the judge and from leaving the state without that prior authorization;

(7) if determined appropriate by the judge, establishing a child safety zone in the same manner as a child safety zone is established by a judge under Section 13B, Article 42.12, Code of Criminal Procedure, and

requiring the person to comply with requirements related to the safety zone;

(8) requiring the person to notify the case manager immediately but in any event within 24 hours of any change in the person's status that affects proper treatment and supervision, including a change in the person's physical health or job status and including any incarceration of the person; and

(9) any other requirements determined necessary by the judge.

(b) The judge may request assistance from the council in determining an appropriate residence for the person.

(c) The judge shall provide a copy of the requirements imposed under Subsection (a) to the person and to the council. The council shall provide a copy of those requirements to the case manager and to the service providers.

(d) Immediately after the case becomes final for purposes of appeal, the judge shall transfer jurisdiction of the case to a district court, other than a family district court, having jurisdiction in the county in which the person is residing, except that the judge retains jurisdiction of the case with respect to a civil commitment proceeding conducted under Subchapters F and G.

(e) The requirements imposed under Subsection (a) may be modified at any time after notice to each affected party to the proceedings and a hearing.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 24, eff. Sept. 1, 2003.

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§ 841.083. TREATMENT; SUPERVISION. (a) The council shall approve and contract for the provision of a treatment plan for the committed person to be developed by the treatment provider. A treatment plan may include the monitoring of the person with a polygraph or plethysmograph. The treatment provider may receive annual compensation in an amount not to exceed $6,000 for providing the required treatment.

(b) The case manager shall provide supervision to the person. The provision of supervision shall include a tracking service and, if required by court order, supervised housing.

(c) The council shall enter into an interagency agreement with the Texas Department of Public Safety for the provision of a tracking service. If the equipment necessary to implement that service is available through a contract entered into by the Texas Building and Procurement Commission, the Department of Public Safety shall acquire that equipment through that contract.

(d) The council shall enter into an interagency agreement with the Texas Department of Criminal Justice for any necessary supervised housing. The council shall reimburse that department for housing costs under this section. The committed person may not be housed for any period of time in a mental health facility, state school, or community center. In this subsection:

(1) "Community center" means a center established under Subchapter A, Chapter 534.

(2) "Mental health facility" has the meaning assigned by Section 571.003.

(3) "State school" has the meaning assigned by Section 531.002.

(e) The case manager shall:

(1) coordinate the outpatient treatment and supervision required by this chapter, including performing a periodic assessment of the success of that treatment and supervision;

(2) make timely recommendations to the judge on whether to allow the committed person to change residence or to leave the state and on any other appropriate matters; and

(3) provide a report to the council, semiannually or more frequently as necessary, which must include:

(A) any known change in the person's status that affects proper treatment and supervision; and

(B) any recommendations made to the judge.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 25, eff. Sept. 1, 2003.

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§ 841.084. STATUS REPORTS AND OTHER INFORMATION. (a) A treatment provider or a supervision provider, other than the case manager or tracking service personnel, shall submit, monthly or more frequently if

required by the case manager, a report to the case manager stating whether the person is complying with treatment or supervision requirements, as applicable.

(b) Tracking service personnel may provide to the case manager specific information relating to the person, including the person's compliance with a tracking requirement or involvement in criminal activity, if:

(1) the council and the Department of Public Safety have entered into a memorandum of understanding governing:

(A) the release of the information by the tracking personnel; and

(B) the use or dissemination of the information by the case manager; and

(2) the release, use, or dissemination is not prohibited by other law or agreement.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 26, eff. Sept. 1, 2003.

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§ 841.085. CRIMINAL PENALTY. A person commits an offense if the person violates a requirement imposed under Section 841.082. An offense under this section is a felony of the third degree.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

SUBCHAPTER F. COMMITMENT REVIEW

§ 841.101. BIENNIAL EXAMINATION. (a) A person committed under Section 841.081 shall receive a biennial examination. The council shall contract for an expert to perform the examination.

(b) In preparation for a judicial review conducted under Section 841.102, the case manager shall provide a report of the biennial examination to the judge. The report must include consideration of whether to modify a requirement imposed on the person under this chapter and whether to release the person from all requirements imposed on the person under this chapter. The case manager shall provide a copy of the report to the council.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.102. BIENNIAL REVIEW. (a) The judge shall conduct a biennial review of the status of the committed person.

(b) The person is entitled to be represented by counsel at the biennial review, but the person is not entitled to be present at that review.

(c) The judge shall set a hearing if the judge determines at the biennial review that:

(1) a requirement imposed on the person under this chapter should be modified; or

(2) probable cause exists to believe that the person's behavioral abnormality has changed to the extent

that the person is no longer likely to engage in a predatory act of sexual violence.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.103. HEARING. (a) At a hearing set by the judge under Section 841.102, the person and the state are entitled to an immediate examination of the person by an expert.

(b) If the hearing is set under Section 841.102(c)(1), hearsay evidence is admissible if it is considered otherwise reliable by the judge.

(c) If the hearing is set under Section 841.102(c)(2), the committed person is entitled to be present and to have the benefit of all constitutional protections provided to the person at the initial civil commitment proceeding. On the request of the person or the attorney representing the state, the court shall conduct the hearing before a jury. The burden of proof at that hearing is on the state to prove beyond a reasonable doubt that the person's behavioral abnormality has not changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

SUBCHAPTER G. PETITION FOR RELEASE

§ 841.121. AUTHORIZED PETITION FOR RELEASE. (a) If the case manager determines that the committed

person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence, the case manager shall authorize the person to petition the court for release.

(b) The petitioner shall serve a petition under this section on the court and the attorney representing the state.

(c) The judge shall set a hearing on a petition under this section not later than the 30th day after the date the judge receives the petition. The petitioner and the state are entitled to an immediate examination of the petitioner by an expert.

(d) On request of the petitioner or the attorney representing the state, the court shall conduct the hearing before a jury.

(e) The burden of proof at the hearing is on the state to prove beyond a reasonable doubt that the petitioner's behavioral abnormality has not changed to the extent that the petitioner is no longer likely to engage in a predatory act of sexual violence.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.122. RIGHT TO FILE UNAUTHORIZED PETITION FOR RELEASE. On a person's commitment and annually after that commitment, the case manager shall provide the person with written notice of the person's right to file with the court and without the case manager's authorization a petition for release.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.123. REVIEW OF UNAUTHORIZED PETITION FOR RELEASE. (a) If the committed person files a petition for release without the case manager's authorization, the person shall serve the petition on the court and the attorney representing the state.

(b) On receipt of a petition for release filed by the committed person without the case manager's authorization, the judge shall attempt as soon as practicable to review the petition.

(c) Except as provided by Subsection (d), the judge shall deny without a hearing a petition for release filed without the case manager's authorization if the petition is frivolous or if:

(1) the petitioner previously filed without the case manager's authorization another petition for release; and

(2) the judge determined on review of the previous petition or following a hearing that:

(A) the petition was frivolous; or

(B) the petitioner's behavioral abnormality had not changed to the extent that the petitioner was no longer likely to engage in a predatory act of sexual violence.

(d) The judge is not required to deny a petition under Subsection (c) if probable cause exists to believe that the petitioner's behavioral abnormality has changed to the

extent that the petitioner is no longer likely to engage in a predatory act of sexual violence.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.124. HEARING ON UNAUTHORIZED PETITION FOR RELEASE. (a) If as authorized by Section 841.123 the judge does not deny a petition for release filed by the committed person without the case manager's authorization, the judge shall conduct as soon as practicable a hearing on the petition.

(b) The petitioner and the state are entitled to an immediate examination of the person by an expert.

(c) On request of the petitioner or the attorney representing the state, the court shall conduct the hearing before a jury.

(d) The burden of proof at the hearing is on the state to prove beyond a reasonable doubt that the petitioner's behavioral abnormality has not changed to the extent that the petitioner is no longer likely to engage in a predatory act of sexual violence.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

SUBCHAPTER H. MISCELLANEOUS PROVISIONS

§ 841.141. RULEMAKING AUTHORITY. (a) The council by rule shall administer this chapter. Rules adopted by the council under this section must be consistent with the purposes of this chapter.

(b) The council by rule shall develop standards of care and case management for persons committed under this chapter.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.142. RELEASE OR EXCHANGE OF INFORMATION. (a) To protect the public and to enable an assessment or determination relating to whether a person is a sexually violent predator, any entity that possesses relevant information relating to the person shall release the information to an entity charged with making an assessment or determination under this chapter.

(b) To protect the public and to enable the provision of supervision and treatment to a person who is a sexually violent predator, any entity that possesses relevant information relating to the person shall release the information to the case manager.

(c) On the written request of any attorney for another state or for a political subdivision in another state, the Texas Department of Criminal Justice, the council, a service provider contracting with one of those agencies, the multidisciplinary team, and the attorney representing the state shall release to the attorney any available information relating to a person that is sought in connection with an attempt to civilly commit the person as a sexually violent predator in another state.

(d) To protect the public and to enable an assessment or determination relating to whether a person is a sexually violent predator or to enable the provision of supervision and treatment to a person who is a sexually violent

predator, the Texas Department of Criminal Justice, the council, a service provider contracting with one of those agencies, the multidisciplinary team, and the attorney representing the state may exchange any available information relating to the person.

(e) Information subject to release or exchange under this section includes information relating to the supervision, treatment, criminal history, or physical or mental health of the person, as appropriate, regardless of whether the information is otherwise confidential and regardless of when the information was created or collected. The person's consent is not required for release or exchange of information under this section.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 27, eff. Sept. 1, 2003.

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§ 841.143. REPORT, RECORD, OR STATEMENT SUBMITTED TO COURT. (a) A psychological report, drug and alcohol report, treatment record, diagnostic report, medical record, or victim impact statement submitted to the court under this chapter is part of the record of the court.

(b) Notwithstanding Subsection (a), the report, record, or statement must be sealed and may be opened only:

(1) on order of the judge;

(2) as provided by this chapter; or

(3) in connection with a criminal proceeding as otherwise provided by law.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.144. COUNSEL. (a) Immediately after the filing of a petition under Section 841.041, a person subject to a civil commitment proceeding under this chapter is entitled to the assistance of counsel at all stages of the proceeding.

(b) If the person is indigent, the court shall appoint counsel as appropriate under Section 841.005 to assist the person.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 28, eff. Sept. 1, 2003.

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§ 841.145. EXPERT. (a) A person who is examined under this chapter may retain an expert to perform an examination or participate in a civil commitment proceeding on the person's behalf.

(b) On the request of an indigent person examined under this chapter, the judge shall determine whether expert services for the person are necessary. If the judge determines that the services are necessary, the judge shall appoint an expert to perform an examination or participate in a civil commitment proceeding on the person's behalf.

(c) The court shall approve reasonable compensation for expert services rendered on behalf of an indigent

person on the filing of a certified compensation claim supported by a written statement specifying:

(1) time expended on behalf of the person;

(2) services rendered on behalf of the person;

(3) expenses incurred on behalf of the person; and

(4) compensation received in the same case or for the same services from any other source.

(d) The court shall ensure that an expert retained or appointed under this section has for purposes of examination reasonable access to a person examined under this chapter, as well as to all relevant medical and psychological records and reports.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999.

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§ 841.146. CIVIL COMMITMENT PROCEEDING; PROCEDURE AND COSTS. (a) On request, a person subject to a civil commitment proceeding under this chapter and the attorney representing the state are entitled to a jury trial or a hearing before a jury for that proceeding, except for a proceeding set by the judge under Section 841.102(c)(1). The number and selection of jurors are governed by Chapter 33, Code of Criminal Procedure.

(b) Except as otherwise provided by this subsection, a civil commitment proceeding is subject to the rules of procedure and appeal for civil cases. To the extent of any conflict between this chapter and the rules of procedure and appeal for civil cases, this chapter controls.

(c) In an amount not to exceed $2,500, the State of Texas shall pay all costs associated with a civil commitment proceeding conducted under Subchapter D. The State of Texas shall pay the reasonable costs of state or appointed counsel or experts for any other civil commitment proceeding conducted under this chapter and shall pay the reasonable costs of the person's outpatient treatment and supervision.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 29, eff. Sept. 1, 2003.

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§ 841.1461. CERTAIN EXPERT TESTIMONY NOT REQUIRED FOR CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATOR. A person who suffers from a behavioral abnormality as determined under this chapter is not because of that abnormality a person of unsound mind for purposes of Section 15-a, Article I, Texas Constitution.

Added by Acts 2003, 78th Leg., ch. 347, § 30, eff. Sept. 1, 2003.

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§ 841.1462. PRIVILEGE FOR PERSONAL INFORMATION THAT IDENTIFIES VICTIM. Personal information, including a home address, home telephone number, and social security account number, that identifies the victim of a person subject to a civil commitment proceeding under this chapter is privileged from discovery by that person.

Added by Acts 2003, 78th Leg., ch. 347, § 30, eff. Sept. 1, 2003.

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§ 841.1463. FAILURE TO GIVE NOTICE WITHIN RELEVANT PERIOD NOT JURISDICTIONAL ERROR. The periods within which notice must be given under this chapter are binding on all appropriate persons as provided by this chapter, but a failure to give notice within the relevant period is not a jurisdictional error.

Added by Acts 2003, 78th Leg., ch. 347, § 30, eff. Sept. 1, 2003.

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§ 841.147. IMMUNITY. The following persons are immune from liability for good faith conduct under this chapter:

(1) an employee or officer of the Texas Department of Criminal Justice, the Texas Department of Mental Health and Mental Retardation, the Texas Department of Health, or the council;

(2) a member of the multidisciplinary team established under Section 841.022;

(3) an employee of the division of the prison prosecution unit charged with initiating and pursuing civil commitment proceedings under this chapter; and

(4) a person providing, or contracting, appointed, or volunteering to perform, a tracking service or another service under this chapter.

Added by Acts 1999, 76th Leg., ch. 1188, § 4.01, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 347, § 31, eff. Sept. 1, 2003.

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§ 841.150. EFFECT OF CERTAIN SUBSEQUENT CONVICTIONS, JUDGMENTS, OR VERDICTS ON ORDER OF CIVIL COMMITMENT. (a) Except as provided by Subsection (b), the following convictions, judgments, or verdicts do not affect an order of civil commitment under this chapter:

(1) a conviction for a felony if a sentence is not imposed;

(2) a conviction for a misdemeanor, regardless of whether a sentence is imposed; and

(3) a judgment or verdict of not guilty by reason of insanity for any offense absent a corresponding commitment to the Texas Department of Mental Health and Mental Retardation.

(b) The statutory duties imposed by this chapter are suspended for the duration of any confinement of a person who receives a conviction described by Subsection (a)(2).

Added by Acts 2003, 78th Leg., ch. 347, § 30, eff. Sept. 1, 2003.
